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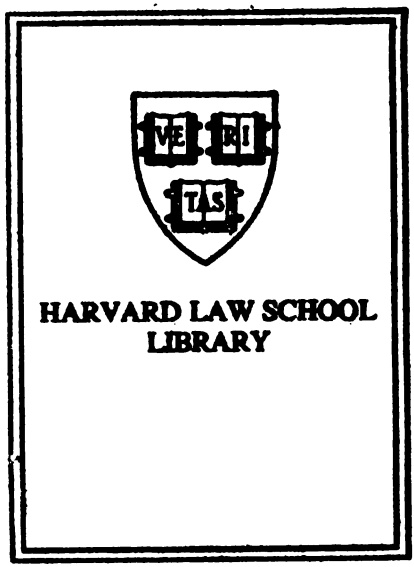

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MINNESOTA REPORTS

VOL. 107

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF MINNESOTA

JANUARY 22—MAY 7, 1909

HENRY BURLEIGH WENZELL
REPORTER

LAWYERS' CO-OPERATIVE PUBLISHING CO.
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SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE PEOPLE OF SAID STATE

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JUSTICES

OF

THE SUPREME COURT

OF MINNESOTA

DURING THE TIME OF THESE REPORTS

Hon. CHARLES M. START, Chief Justice.
Hon. CALVIN L. BROWN.
Hon. CHARLES L. LEWIS.
Hon. EDWIN A. JAGGARD.
Hon. CHARLES BURKE ELLIOTT.

CARL A. PIDGEON, Esq., Clerk.

ATTORNEY GENERAL:
HON. GEORGE T. SIMPSON.

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NOTE

By R. L. 1905, § 85, the reporter is required to report all cases decided by the court.

By R. L. 1905, § 74, the headnote in each case is prepared by the judge writing the opinion.

With few exceptions the cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court and the number of the case in the general term calendar, the calendar numbers being enclosed in ( ). The case beginning on page 196 is from the April, 1908, term calendar. The cases on pages 437, 441, 442, 453 to 505, inclusive, 572 and 573 are from the April, 1909, term calendar. The other cases are from the October, 1908, term calendar.

As required by R. L. 1905, § 85, when any Minnesota case has been printed in the periodical known as "The Northwestern Reporter," and is cited in any opinion in this volume, a reference to the book and page of that periodical where such case appears has been inserted in such opinion. A similar citation for each opinion in this volume has been given in a footnote.

In citations from the first twenty volumes of the Minnesota Reports the page of the original edition is given, preceded by the corresponding page of the edition prepared by Chief Justice Gilfillan.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

HENRY C. LEONARD v. CHARLOTTE CLARK.[1]

January 22, 1909.

Nos. 15,833—(179).

Denial of New Trial—Appeal.

The evidence in this case is not so manifestly against the findings of the trial court as to require the reversal of the order denying a motion for a new trial.

Action in the municipal court of Duluth to recover $317 for medical services rendered at the request of defendant to a third person. The case was tried before Windom, J., who found in favor of defendant. From an order denying his motion for a new trial, plaintiff appealed to the district court for St. Louis county and from an order of that court, Cant and Dibell, JJ., affirming the order of the municipal court, plaintiff appealed. Affirmed.

Ross & McKnight, for appellant.

E. P. Towne, W. S. Telford, and *Edmund Ingalls,* for respondent.

ELLIOTT, J.

This action was commenced in the municipal court of the city of Duluth to recover the value of professional services alleged to have been rendered at the request of the defendant. The plaintiff was a

[1] Reported in 119 N. W. 485.

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physician and surgeon, and was called to attend an employee of the defendant, who had been injured while working about a laundry. He attended the girl during several months. The case was tried without a jury, and the court found as a fact that the services were not rendered at the instance and request of the defendant. A motion for a new trial was made and denied. From this order the plaintiff appealed to the district court, which affirmed the order of the municipal court. On the appeal from that order, we are now asked to review the evidence and reverse on the ground that the finding of fact made by the municipal judge was not justified by the evidence.

The action was brought to recover on the theory that the services were worth $317 and were rendered at the special instance and request of the respondent, Mrs. Clark. The answer was a general denial. Dr. Leonard testified that on August 23, 1906, he was called to the laundry by telephone to see the girl who had just been injured, and was there requested by Mr. Clark, the respondent's manager, to take charge of the case and do what was needed. There was no talk then about pay. He dressed the injury, and Clark had the girl taken to her home. Dr. Leonard continued to care for the girl at her home until April 5, 1907. During that time he says he consulted with Mr. Clark, and sometimes with Mrs. Clark, as to what would have to be done. Dr. Leonard says at no time was it intimated that he was not in their employ.

On his first visit to the house some one there made himself disagreeable to the doctor, and the same thing occurred at the next visit. Dr. Leonard testified that on the twenty sixth of March he met Mr. and Mrs. Clark on the street and informed them that he would not continue with the case, and that Mrs. Clark then told him "to go ahead and there would be no further trouble." He refused to attend the case longer unless arrangements could be made so that he would not be interfered with. Nothing was then said as to who would pay for his services.

On December 12, Mrs. Clark was at Dr. Leonard's office, and they considered "what was best to do with Tozzy Delaske, and especially with the fear there would certainly be costs to pay." He says that he had a number of conversations with Mr. Clark with reference to the payment of his bill, but never mentioned it to Mrs. Clark. In April, 1907, he presented his bill to Mr. Clark at the laundry, when Mr. Clark

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said that they did not wish to settle the bill until after they "had made a settlement with the Delaskes, because they thought by giving them a lump sum and getting them to assume the bill they could get off cheaper, and he told me he didn't want the bill presented then, and didn't want to know what it was, so they could make a better settlement with the Delaskes, as he thought." During the conversation Dr. Leonard said to Mr. Clark: "Well, don't make any settlement without letting me know, so I can garnishee and get my bill. Q. What you said was, 'Don't make any settlement without letting me know, so I can garnishee?' A. We made that settlement just in that way." Dr. Leonard made no charges to the Delaskes for these services.

The defendant, Mrs. Clark, testified that she was the proprietor of the laundry, and that her husband was her manager, and had authority to employ a physician to attend any one who was injured at the laundry. She never employed Dr. Leonard to attend the girl. She did not remember having the conversation with him three days after the accident. She had a conversation with Dr. Leonard on December 12, 1906. She knew her husband had called Dr. Leonard at the time of the accident, but never had any conversation with him about his bill. She knew he was treating the girl, and she talked with him about her. She made a settlement with the girl, but did that before she knew Dr. Leonard had charged her for his services. In making the settlement, she testified: "I didn't expect, if they signed an agreement, * * * we were to pay the bill; but they didn't do that, and they assumed the responsibility of the bill themselves, and they were to pay it. Never said a word to Dr. Leonard about the bill, never spoke of it." Mr. Clark testified that he instructed some one to telephone for Dr. Leonard; remembered meeting Dr. Leonard on the street a few days after the accident; had no conversation then with Dr. Leonard as to who was responsible for his bill for services.

After the girl was able to go to work, Dr. Leonard came in "and wanted to know who he should make his bill out to. I told him that he need not make out any bill; that we would see how we would settle with them, and he said, 'Well, if you should settle with them, let me know, will you?' I said, 'I will guarantee to let you know if we settle, and they agree to pay the bill, and they are to pay the bill.' 'If you settle and they are to pay the bill,' he said, 'I wish you would be

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sure and let me know, so I can possibly garnishee the money before it passes into their hands.' I said, 'I will let you know when the money passes, so you can protect yourself.' And he said, 'That will be all right.'" After the settlement was made, Dr. Leonard called on Mr. Clark and asked to whom he should make out his bill. Mr. Clark testified that he replied, "You make it out to them, the settlement was made, and they are to pay the doctor. He said, 'The money has not been paid yet?' I said, 'No; Mr. Towne has the check ready to pay it over; possibly you had better go and see him.'"

Questions of fact only are involved on this appeal; but the earnestness with which the appellant contends that the finding of the trial judge, which on appeal was approved by two district judges, is manifestly contrary to the great weight of the evidence, has induced us to review the evidence to this extent. The evidence is not at all conclusive. Dr. Leonard testified, in effect, that he was employed by Mrs. Clark, and this she denied. She also denied conversations from which the plaintiff sought to have the inference of employment drawn. The evidence as to the emergency call would have created liability for the value of the services then rendered. But the record contains no evidence of the value of such services. The dealing with reference to the assumption of the doctor's claims if settlement was made, and the arrangement with reference to suing the girl and garnishing the Clarks, lends color to the theory that the appellant was not then asserting an absolute claim against the Clarks.

This court would not be justified in saying that there is no evidence reasonably tending to sustain the finding of fact that Mrs. Clark never employed Dr. Leonard, and the order denying a new trial is therefore affirmed.

Order affirmed.

JAGGARD, J., dissents.

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H. G. ALLEN v. WISCONSIN CENTRAL RAILWAY COMPANY and Another.[1]

January 22, 1909.

Nos. 15,896—(187).

Negligence in Making Up Train.

Although a switching crew, engaged in making up a freight train in a railroad yard, was not required to give notice to the crew of the train when cars were about to be connected and when the train was finally made up, yet the switching crew was required to perform the work with reasonable care; and, if it was performed in a reckless or unusual manner, the railway company was not excused from responsibility simply because the train crew commenced work upon the train under the supposition that the switching crew had completed its work.

Contributory Negligence of Train Brakeman.

The members of the train crew were required to anticipate and assume the dangers attending switching operations when conducted in the usual manner; but they were not bound to assume the results attending reckless switching, and a brakeman was not necessarily guilty of contributory negligence in going between cars to couple up the air hose, acting upon the belief that the switching was practically completed.

Action in the district court for Ramsey county against the Wisconsin Central Railway Company and the Chicago, Milwaukee & St. Paul Railway Company to recover $25,000 for personal injuries sustained by plaintiff while in the employ of defendant Central Company. The case was tried before Olin B. Lewis, J., who directed a verdict in favor of the Central Company, and a jury which rendered a verdict against the St. Paul Company for $16,000. The defendant Central Company used the railway yards of the St. Paul Company at Milwaukee under an agreement by the terms of which it was the duty of the St. Paul Company to do all switching and making up of trains for the Central Company. The other facts are stated in the opinion. From an order denying plaintiff's motion for a new trial as against the Central Company, he appealed. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant St. Paul Company appealed. Affirmed on both appeals.

[1] Reported in 119 N. W. 423.

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Humphrey Barton, for appellant Allen.

F. W. Root, for appellant St. Paul Company.

Thos. H. Gill, Walter D. Corrigan, Walter L. Chapin and *Clifton Williams,* for respondent.

LEWIS, J.

Plaintiff was a brakeman in the employ of the Wisconsin Central Railway Company, and belonged to a crew, consisting of the conductor and another brakeman, engaged in operating a freight train between Milwaukee and Fond du Lac, Wisconsin. The train was made up at the railroad yards in the city of Milwaukee by a switching crew in the employ of the Chicago, Milwaukee & St. Paul Railway Company. The manner of making up the train was as follows: The switching crew first set the caboose in on the proper track, and pulled the several freight cars out from the various lead tracks and delivered them in the proper order, thus building up the train from the caboose forward. It was the usual practice, after getting the several cars from the different lead tracks in the immediate yard, to go to a point several hundred feet from the yard, and get what were known as the "merchandise cars," bring them over, and complete the train. On the occasion in question the plaintiff, the conductor, and the other brakeman had, according to their custom, taken their positions in the caboose, which had been placed on the track, at the usual hour in the evening, about eight o'clock, and while waiting there some cars were connected, and the crew, thinking the merchandise cars had been attached, went out to perform the work of getting ready to start the train. It was the conductor's duty to register the number of cars, and the plaintiff's duty to connect the air couplings between the several cars.

On this occasion they proceeded in the usual manner, commencing at the caboose. Plaintiff passed in between the caboose and the next freight car for the purpose of making the connection; but, having some trouble in adjusting it, he called upon the car inspector, who happened to be standing near by, for something with which to drive the parts together. Ordinarily the air connection could be made in a few seconds, but at this time plaintiff was engaged two or three times longer than usual, and just as he had finished the work and was in the act of turning around to step out from between the cars, the train was struck by

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other cars in the process of switching, and suddenly driven back for a distance of four or five car lengths, and plaintiff was caught under the wheels, and one leg was crushed and the other injured.

A verdict was recovered, and at the trial the cause was dismissed as to the Wisconsin Central Railway Company. The Chicago, Milwaukee & St. Paul Railway Company appealed from an order denying its motion for judgment notwithstanding the verdict, and the following questions are before the court:

Appellant insists that there is no evidence reasonably tending to show that it was guilty of any negligence in the switching operations, and that it was conclusively established by the evidence that respondent was guilty of contributory negligence. Both propositions will be discussed together.

Appellant's argument is based upon the claim that it was the universal custom for the Wisconsin Central train crew to refrain from working about the train until the switching was finally completed and the train made up, and that appellant did not violate any duty which it owed respondent, conceding that it was guilty of negligence in the switching operations. It is true that the switching crew were not required to give notice to the train crew when they were about to add more cars in making up the train, and were not obliged to give notice of the completion of their switching operations. The train crew were required to anticipate that cars would be switched in at any time, and they were to determine for themselves when the train was finally made up. But there was no special rule on the subject, nor was it the custom for them to wait until the train was finally made up before commencing the work of registering the number of cars and connecting the air. As testified to by respondent, the train was usually delayed in getting out of the yards, and the train crew did not always wait until the train was completed before commencing their work. Occasionally they arrived at the front of the train, in the course of their work as it was being made up, and would meet the switching crew engaged in completing their work, although the merchandise cars were usually the last to be attached.

The particular incident which caused the injury was a most careless act in switching. The switching crew shunted into the cars already on the track ten or twelve merchandise cars at the rate of four or five

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miles an hour. The impact was such that it damaged property in the caboose and drove the train back four or five car lengths. The switching crew knew that the train crew were likely to be in the caboose at that time, even if they did not expect the men to be coupling up cars. The train crew were justified in assuming that the switching would be done in the usual manner, and to conduct themselves accordingly. It is evident that the conductor and the brakeman, when they went out of the caboose for the purpose of registering and connecting the cars, assumed that the merchandise cars had been connected and that the main switching operations had been done. They were led to that opinion by a shock felt while in the caboose. It was the general practice to wait until the merchandise cars were attached, and it is quite clear that on this occasion the crew did not intend to commence work on the train until those cars had been put on. However, the fact that they made a mistake did not change the nature of the duty which the switching crew owed them. That duty was the exercise of ordinary care, such as was customarily employed in such operations. That crew had no license to engage in all manner of reckless switching simply because the rules of the company did not require them to give notice of their operations.

Of course, respondent was required to exercise ordinary caution in connecting the cars, and to do so with reference to the dangers of working while the switching operations were going on. The rules did not prohibit the coupling of cars while switching was in progress, and by practice the train crew were permitted to act upon their own judgment, so as to avoid delay. But human judgment is not infallible, and a mistake of judgment does not always foreclose recovery of damages for the negligence of another. Respondent remained longer than usual between the cars; but it was necessary, and there is every reason to believe that he would not have been injured had the switching been conducted in the usual manner. The evidence was sufficient to sustain the finding of the jury as to both propositions.

We discover no ground for holding the Wisconsin Central Railway Company responsible for the accident, and the trial court correctly directed a verdict for that company.

Both appeals affirmed.

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GERTRUDE BERNICK v. THOMAS S. McCLURE and Others.[1]

January 22, 1909.

Nos. 15,898—(157).

Replevin—Findings Sustained by the Evidence.

Replevin for certain cows, steers, and Angora goats. *Held*, that the findings of fact of the trial court to the effect that the plaintiff is entitled to recover the possession of the personal property are sustained by the evidence, and that there was no reversible error in the rulings of the court at the trial.

Action by the administratrix of Mary Plehan, deceased, in the district court for Stearns county against Thomas S. McClure, Charles A. Bernick and George R. Whitney, to recover possession of personal property or $1,000, the value thereof. The substance of the pleadings is stated in the opinion. The case was tried before Baxter, J., who made findings and ordered judgment in favor of plaintiff. From an order denying their motion for a new trial, defendants McClure and Whitney appealed. Affirmed.

Stewart & Brower, F. W. Booth, and *James R. Bennett, Jr.,* for appellants.

J. D. Sullivan, for respondent.

START, C. J.

This action was originally commenced by the plaintiff's intestate, Mary Plehan, for whom the plaintiff has been substituted, in the district court of the county of Stearns, to recover possession of two hundred Angora goats, fifteen cows, and four steers. The complaint alleged that the plaintiff, Mary Plehan, was the owner of the personal property, which was of the value of $1,000. The answer of the defendant Whitney admitted the possession of the property and its value, denied the other allegations of the complaint, and alleged that he was the owner of the property as the receiver of the property of the defendants McClure and Bernick; that the only claim of the plaintiff to the property was a chattel mortgage made to Mary Plehan by the de-

[1] Reported in 119 N. W. 247.

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fendant Bernick to defraud his creditors, of which she had full notice; and, further, the property was then owned by McClure by virtue of a contract between him and Bernick, of which she also had full notice. The reply put in issue the new matter alleged in the answer.

The cause was tried by the court without a jury, and findings of fact were made in favor of the plaintiff, which were to the effect that the property described in the chattel mortgage was at the date of its execution owned by the mortgagor, the defendant Bernick, and that the mortgage was made in good faith to secure the sum of money therein named, which sum was actually loaned to the mortgagor by the mortgagee, and without any notice on her part of any claim of the defendant McClure to the property. As a conclusion of law judgment was ordered for the plaintiff.

The defendants McClure and Whitney appealed from an order denying their motion for a new trial. The assignments of error raise two questions: (a) Did the trial court err in its rulings upon matters of evidence? (b) Are the findings of fact upon the question of ownership of the property and the bona fides of the mortgage sustained by the evidence?

1. The defendant Bernick did not answer. He was, however, properly made a party to the action, as he was the mortgagor and the property was in his physical possession when the action was commenced. The plaintiff called the defendant for cross-examination under the statute (R. L. 1905, § 4662), and so examined him, to which the defendant Whitney objected, for the reason that defendant Bernick was in default. The court overruled the objection, and the ruling is assigned as error, and in support thereof the case of Suter v. Page, 64 Minn. 444, 67 N. W. 67 is cited. That case was one where the plaintiff called a defaulting defendant, and claimed the legal right to examine him as if under cross-examination by virtue of the statute, and the defendant who had answered objected, and the objection was sustained. On appeal this court construed the statute to the effect that a defaulting defendant could not, as a matter of right, be called for cross-examination by virtue of the statute. In this case the plaintiff was permitted as a matter of right to call a defaulting defendant, and he was examined under the statute; and in this respect it differs from the case cited. Nevertheless, we are of the opinion that the plaintiff did

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not have the strict legal right to so call such defendant, and that the ruling of the trial court was at least a technical error.

The question then is: Was the error prejudicial to the substantial rights of the defendant, and therefore reversible error? The object of the statute is to enable a party to an action to call his adversary as a witness, and obtain, if he can, from him evidence favorable to his own side of the case, without being bound by the testimony if it proves to be adverse, and in so doing to give the party so calling for such examination the advantage of a cross-examination of a witness called by himself without appealing to the discretion of the court.

The evidence shows that all the evidence elicited on the examination of the defendant Bernick was only such as would have been proper and might have been obtained if he had been called as the plaintiff's own witness. There was no attempt made by the plaintiff to discredit or contradict the witness, by asking disparaging questions or otherwise, nor claim by the plaintiff that she was not bound thereby; hence the only possible ground for claiming that the ruling of the court was prejudicial is that it gave the plaintiff an opportunity to ask leading questions. The record shows that the testimony of the defendant Bernick and the manner of eliciting it are not materially different than they would have been if he had been called as plaintiff's witness. We are satisfied that the ruling of the court in question was not reversible error, and so hold.

The defendants also assign as error the ruling of the trial court in overruling their objection to evidence as to the name of the record owner of the land upon which the personal property was kept and in whose name it was assessed. It may be conceded that such evidence had no direct tendency to prove title to the personal property; but it was not improper to receive the evidence upon the question of the location and possession of the personal property. But, were it otherwise, the ruling would not be ground for a new trial, in view of the fact that the cause was tried by the court without a jury. See Mankato Mills Co. v. Willard, 94 Minn. 160, 102 N. W. 202.

2. The serious question in this case is whether the findings of fact as to the ownership of the property are sustained by the evidence. It is the contention of the appellants in this connection that the evidence conclusively establishes that Bernick, the mortgagor, had no interest

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in the property which he mortgaged. We have examined the record with particular reference to this claim, and have reached the conclusion that the findings of fact are sustained by the evidence, within the rule applicable to such cases.

Order affirmed.

DAVID R. LOUDEN v. MODERN BROTHERHOOD OF AMERICA.[1]

January 22, 1909.

Nos. 15,942—(87).

Life Insurance—Conditions of Policy.

Benevolent fraternal associations are not included in the class of insurance companies referred to in section 1616, R. L. 1905, which provides that neither the application nor the by-laws shall be considered as a part of the contract, unless incorporated in the policy.

Membership in Fraternal Association.

According to the by-laws of respondent association the beneficiary fund is applicable to members only, and, to constitute membership in a prospective local lodge, the applicant must pass the physician's examination, be accepted at the head office, and be initiated and receive the obligation after the local lodge is organized. If the applicant is in good health upon the completion of these several steps, he is entitled to receive a certificate of membership.

Authority of Deputies—Contract.

District and local deputies have authority to solicit and receive applications for membership in a local lodge, receive the membership and examination fees, forward the applications to the home office, receive the certificate when approved by the home office, and deliver the same to the secretary of the local lodge when organized. But such deputies have no authority to vary the terms of the contract by accepting assessments or by delivering the certificate to applicants before the lodge is organized and the applicant becomes a member.

Same—Uncompleted Contract.

The application of respondent's wife was approved by the home office and returned to the local deputy, who delivered it to her with the declaration that it was in force. The lodge was organized a week later, and

[1] Reported in 119 N. W. 425.

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she was voted in as a member, but was prevented by sickness from attending, and so was not initiated and did not receive the obligation. After the lodge was organized the certificate was attested by respondent as secretary and by the president, and redelivered to her. *Held*, she did not become a member of the lodge, the contract was not completed, and the certificate was void.

Waiver—Judgment Notwithstanding Verdict.

Respondent, the beneficiary named in the certificate, reported as secretary of the local lodge to the head office that the applicant had become a member, and respondent paid several assessments, which were received and applied in payment thereof at the head office in ignorance of the facts. *Held*, acceptance of the money did not constitute a waiver by the association of the right to repudiate the transaction and the certificate upon discovery of the facts. On the undisputed evidence the defendant was entitled to judgment notwithstanding the verdict.

Action in the district court for Freeborn county to recover $1,000 upon a contract of insurance. The case was tried before Kingsley, J., and a jury which rendered a verdict in favor of plaintiff for $1,060. From an order denying defendant's motion for judgment notwithstanding the verdict, it appealed. Reversed and judgment ordered for defendant.

Kerr & Fowler, Blythe Markley, and *Rule & Smith,* for appellant.

H. H. Dunn and *Lafayette French,* for respondent.

LEWIS, J.

Appellant was organized in the state of Iowa under a statute as follows: "A fraternal beneficiary association is hereby declared to be a corporation, society, or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, and having a local lodge system, with ritualistic form of work and representative form of government." The association was permitted to carry on business in other states than Iowa, and for that purpose it appointed district or local deputies, who were authorized to receive applications for membership and to organize local lodges. A state manager was appointed for Minnesota, and a Mr. Aldrich was appointed district manager for certain territory, including the village of Glenville, and a Mr. Adams was appointed as a local deputy for the purpose of soliciting and receiving applications

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for membership in the local lodge to be organized at Glenville. Insurance was the leading feature of the association, and all applicants, with a special exception, who received certificates of membership were subject to assessment. When ten applications for membership had been received and accepted at the main office, the deputies were authorized to call a meeting of such applicants and organize the local lodge. The certificates of membership, having been approved and returned from the home office, were attested by the president and the secretary of the local lodge, and delivered to the member, at which time they became effective.

In February, 1906, Calista E. Louden, the wife of respondent, made application for membership in a lodge to be organized in the village of Glenville. She passed the physician's examination, and her certificate was approved at the home office and returned to Mr. Adams, the local deputy, who had solicited her application, among others. Instead of retaining the certificate until the lodge was organized, Adams handed it to Mrs. Louden herself, or to respondent for her. Soon after this occurrence, a sufficient number of applicants having been approved by the main office and returned, a meeting of the applicants was called for March 22, for the purpose of organizing the lodge. At that meeting respondent was elected secretary and Mr. Koontz president. The deputies were present and initiated the applicants, with the exception of Mrs. Louden, who was unable to be present on account of sickness. Notwithstanding that fact, upon the completion of the organization, respondent, as secretary, and Mr. Koontz, as president, attested Mrs. Louden's certificate of membership and certified to the fact that she was a member of the lodge, and so informed the home office in Iowa. Respondent, who was the beneficiary in the certificate held by his wife, paid the assessments as they became due, which amounts were received at the home office and applied to the proper account. Mrs. Louden died of acute Bright's disease on June 9, 1906, and, the association having failed to honor the certificate, this action was brought to recover the amount of the certificate, $1,000, with interest.

1. One of the defenses relied upon by the association is that the certificate of membership never became a valid contract, for the reason that Mrs. Louden never became a member of the association. In an-

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swer, respondent refers to section 1616, R. L. 1905, and claims that the defense is not available because those portions of the by-laws relied on were not set out in the certificate. The statute is as follows: "A statement in full of the conditions of insurance shall be incorporated in or attached to every policy, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty or a part of the contract, except in so far as they are so incorporated or attached."

Chapter 19, R. L. 1905, is divided into many heads and treats of all classes of insurance companies and fraternal associations. Under the head of "General Provisions and Definitions" it is provided by section 1594 that, unless the context otherwise requires, "company," or "insurance company," shall include every corporation and association engaged in insurance. Fraternal beneficiary associations are specially referred to, and are defined as in the Iowa statute. Sections 1595, 1596, and 1597 refer to insurance proper, or to companies engaged in the business for profit. Under the heading "Life Insurance Companies," commencing with section 1687, fraternal co-operative associations are exempt from the general provisions applicable to life insurance companies. The same exception is made in section 1695, and beneficiary and fraternal associations are specially referred to in section 1703. An exception is also made with reference to fraternal beneficiary associations in section 1710. Notwithstanding some doubt arises from the fact that section 1616 is general in terms, and is found under the general heading "Provisions Common to All Companies," it is reasonably certain that there was no intention to make any change in the then existing law, and place fraternal benevolent associations in the same class with fire insurance companies in this respect.

2. The association issues no certificates except to members, and there can be no members until they pass the local physician's examination, receive the approval of the main office, are initiated into the lodge, and receive the obligation. Acceptance by a vote of the other members is a necessary step, but not the final act constituting membership. The by-laws also contain express stipulations, viz., that no certificate shall become binding until the applicant has become a member, and the certificate attested by the local officers and delivered to the applicant, in good health. The association reserves the right to

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cancel the application if, between the time of the physician's examination and the final act constituting membership, the applicant should become disqualified on account of sickness. The contract is that the applicant must be in good health at the time he completes the final act of membership. Then, and not till then, is he entitled to the certificate.

3. Such being the contract, did the deputies, or either of them, have any authority to vary its terms, and to deliver to Mrs. Louden the certificate, so as to make it binding in advance of the organization of the lodge, or did they have authority at the time of the organization to direct that she be accepted as a member, for the purpose of receiving a certificate, notwithstanding her absence? We answer these questions unreservedly in the negative. The by-laws unqualifiedly restrict the authority of the deputies to the mere duty of soliciting applications, forwarding the same to the home office, and receiving membership and physician's fees. They were authorized to organize lodges and give instructions in the ritual work, but were not endowed with any general authority which permitted them to depart from the provisions of the by-laws, and therefore the act of Mr. Adams in handing the policy to the beneficiary, or his wife, a week before the lodge was organized, with the statement that it became effective from that date, was not the act of the association; and if either of the deputies at the time of the organization stated that the presence of Mrs. Louden was not necessary, and directed the president and secretary to attest her certificate and report to the home office that she was a member, such act was without authority and void. Neither the applicant, nor the beneficiary, had any right to rely upon any such statement, if it was made.

4. Finally respondent invokes the doctrine of waiver. It is true that the several amounts paid by the beneficiary were received at the home office and applied in payment of the assessments; but in so doing the officers of the association relied on the correctness of the report by respondent, as secretary, and Koontz, as president, that Mrs. Louden was in fact a member. Those officers of the local lodge were endowed with authority to determine that fact for the association. Respondent, as secretary, was charged with knowledge of the by-laws. His authority was there defined. His duty was to certify to the facts only, and, having certified that his wife was a member, the head offi-

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cers were justified in accepting his representation as true and in receiving the money he sent. The truth was not discovered until proof of death was made. The right to repudiate the transaction by which the certificate was delivered was not waived by acceptance of the money, for the reason that the officers were ignorant of their right to repudiate. The facts controlling this case are undisputed. The law is well settled, and the learned trial court was in error in assuming that there were questions of fact for the jury. Graves v. Modern Woodmen, 85 Minn. 396, 398, 89 N. W. 6; Taylor v. Grand Lodge A. O. U. W. of Minn., 96 Minn. 441, 442, 105 N. W. 408, 3 L. R. A. (N. S.) 114.

Reversed. Judgment ordered for appellant.

JAGGARD, J.

I dissent.

ALEXANDER DAVIDSON v. FLOUR CITY ORNAMENTAL IRON WORKS.[1]

January 22, 1909.

Nos. 15,947—(233).

Emery Wheels Must be Guarded.

Emery wheels are included within the machinery required to be guarded, as provided by section 1813, R. L. 1905.

Same—Failure Is Negligence Per Se.

Where it is practicable to maintain a guard over emery wheels, it is negligence per se to operate the same without a guard.

Statutory Duty is a Continuing Duty.

The statutory duty is a continuing one, requiring the guard to be maintained while the wheel is in operation, and that duty is not discharged by merely furnishing a suitable guard and exercising reasonable care in the selection of an operator.

[1] Reported in 119 N. W. 483.

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Operator and Plaintiff not Fellow Servants.

In this case the duties of the operator required him to change wheels from time to time to meet the exigencies of the work, and in making the change it was necessary to take off the guard. The operator removed the guard and made the change, but neglected to replace the guard, and, while revolving, the wheel burst and caused the injuries sustained by respondent. *Held*, the operator and respondent were not fellow servants. The defenses, contributory negligence and assumption of risk, have no application, and appellant was responsible for the failure to maintain the guard.

Action in the district court for Hennepin county to recover $5,000 for personal injuries. The case was tried before Holt, J., and a jury, which returned a verdict in favor of plaintiff for $4,000. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Lancaster & McGee and *G. A. Lyon,* for appellant.

The provisions of R. L. 1905, § 1813, are not applicable to the case at bar, but if they are defendant's motion should have been granted because the operator and respondent were fellow servants. Northern Pac. R. Co. v. Herbert, 116 U. S. 642; McMahon v. Davidson, 12 Minn. 232, 249 (357); Foster v. Minnesota Central Ry. Co., 14 Minn. 277, 280 (360). As to difference in grade of employment, see Brown v. Winona & St. P. R. Co., 27 Minn. 162; Corneilson v. Eastern Ry. Co., 50 Minn. 23; Gittens v. William Porten Co., 90 Minn. 512; Pasco v. Minneapolis Steel & Machinery Co., 105 Minn. 132; Dixon v. Union Iron Works, 90 Minn. 492; Ling v. St. Paul, M. & M. Ry. Co., 50 Minn. 160.

The court has repeatedly held that section 1813 did not abolish the defense of assumption of risk. Anderson v. C. N. Nelson Lumber Co., 67 Minn. 79; Swenson v. Osgood & Blodgett Mnfg. Co., 91 Minn. 509; McGinty v. Waterman, 93 Minn. 242; Schutt v. Adair, 99 Minn. 7; 2 Labatt, Master & Servant, §§ 649, 650; Clark v. Riter-Conley Co., 57 N. Y. Supp. 755, and 81 N. Y. Supp. 919; Roskee v. Pulp Co., 169 Mass. 528.

The verdict was excessive. Slette v. Great Northern Ry. Co., 53 Minn. 341; Campbell v. Railway Transfer Co., 95 Minn. 375; Goss v. Goss, 102 Minn. 346.

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Lind, Ucland & Jerome, for respondent.

R. L. 1905, § 1813, should be so construed as to effectuate the wise and humane purpose of its enactment. Tvedt v. Wheeler, 70 Minn. 161; Chicago, M. & St. P. Ry. Co. v. Voelker, 129 Fed. 522.

Failure to maintain the guard was negligence per se. Union Pac. Ry. Co. v. McDonald, 152 U. S. 262; Rosse v. St. Paul & D. Ry. Co., 68 Minn. 216; Klatt v. Foster, 97 Wis. 641; Perry v. Tozer, 90 Minn. 431; Schutt v. Adair, 99 Minn. 7. There is no question of contributory negligence or assumption of risk.

The master's duty was two-fold: (a) To furnish a safe place to work as required by the common law; Drymala v. Thompson, 26 Minn. 40; Tierney v. Minneapolis & St. L. Ry. Co., 33 Minn. 311; Lindvall v. Woods, 41 Minn. 212; 12 Am. & Eng. Enc. (2d Ed.) 959; Hough v. Railway Co., 100 U. S. 213; Rincicotti v. O'Brien, 77 Conn. 617; (b) to keep the emery wheel guarded as required by the statute; Christianson v. Northwestern Compo-Board Co., 83 Minn. 25; Osborne v. McMasters, 40 Minn. 103. It was the duty of the master to keep the guard constantly in place. McGinty v. Waterman, 93 Minn. 242. Two persons may not agree that one may violate a statute of this character and escape responsibility. Taft in Narramore v. Cleveland, C., C. & St. L. R. Co., 96 Fed. 298; Monteith v. Kokomo, 159 Ind. 149; Sipes v. Michigan, 137 Mich. 258; Marino v. Lehmaier, 173 N. Y. 530, reversing Knisley v. Pratt, 148 N. Y. 372, holds that there is no assumption of risk contrary to the statute. Stewart v. Ferguson, 164 N. Y. 553, is to the same effect. The doctrine of the assumption of risk ought not to be extended.

The operator of the machine, as operator, was a mere fellow servant; in the maintenance of the guard he was vice-principal.

LEWIS, J.

Appellant is engaged in the manufacture of ornamental iron work in the city of Minneapolis. One Sandstrom, who had been in the employ of appellant for about a year, was operating an emery wheel about twenty four inches in diameter, which revolved at the rate of about one thousand revolutions per minute. The guard provided for this wheel had been temporarily removed by Sandstrom, and while running without the guard the wheel burst, and one of the pieces struck re-

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spondent, who was at work some forty feet distant, and inflicted a compound fracture of the thigh bone. Respondent recovered a verdict, and it is argued here: (1) That the statute (section 1813, R. L. 1905) had no application to emery wheels; (2) that the evidence conclusively established the fact that Sandstrom and respondent were fellow servants; (3) that the verdict was excessive.

1. The first part of section 1813 reads: "All saws, planers, * * * all set screws, drums, and machinery, * * * as far as practicable, shall be fenced or otherwise protected." And the last reads: "No grindstone, emery wheel, or machine in any factory, mill, or workshop shall be used when the same is known to be cracked or otherwise defective." This provision is not exclusive of and inconsistent with what precedes, but is an addition thereto. Emery wheels are fairly within the first part of the section; but, notwithstanding the fact that such wheels must be guarded, there is an additional prohibition against using such wheels when they are cracked or defective.

2. Sandstrom had been employed to work upon the emery wheel, and we shall assume that he had been properly instructed not to use it without a guard. In the course of his duties it became necessary for him to change wheels to suit the implements he was required to polish, and in making such change he was obliged to remove the guard. On the occasion in question he had changed the wheel, but proceeded to use it without restoring the guard, when, after about a day's time, it exploded.

A failure to comply with the statute constitutes negligence per se, but contributory negligence and assumption of risks are defenses which may be interposed in proper cases. Christianson v. Northwestern Compo-Board Co., 83 Minn. 25, 85 N. W. 826, 85 Am. St. 440; Wuotilla v. Duluth Lumber Co., 37 Minn. 153, 33 N. W. 551, 5 Am. St. 832; Tvedt v. Wheeler, 70 Minn. 161, 72 N. W. 1062; Gray v. Commutator Company, 85 Minn. 463, 89 N. W. 322; Seely v. Tennant, 104 Minn. 354, 116 N. W. 648; Callopy v. Atwood, 105 Minn. 80, 117 N. W. 238; Anderson v. C. N. Nelson Lumber Co., 67 Minn. 79, 69 N. W. 630; Swenson v. Osgood & Blodgett Mnfg. Co., 91 Minn. 509, 98 N. W. 645; McGinty v. Waterman, 93 Minn. 242, 101 N. W. 300; Schutt v. Adair, 99 Minn. 7, 108 N. W. 811.

The statute requires such machinery to be guarded so as to protect

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workmen, whether operating the machinery or engaged in the discharge of any other duties in the factory. Christianson v. Northwestern Compo-Board Co., supra. In that case the party was injured while working about an unguarded saw, but not directly in connection with it. In Seely v. Tennant, supra, the deceased was caught by an unguarded revolving shaft while passing by it in the performance of duties not directly connected with it.

There is no dispute as to the facts, and the question of contributory negligence and assumption of risk have no place in this case. Respondent was engaged in other duties at some distance, and was entirely ignorant of the failure to replace the guard on the wheel. The question at issue is one of statutory construction. If the duty imposed by statute was a continuing one, and the master was required to maintain the guard while operating the wheel, in addition to installing it in the first place, then the operator charged with the control and management of the wheel and guard was the representative of the master. On the other hand, if the master discharged his duty by furnishing a suitable guard and by exercising reasonable care in the selection of an operator, and gave him suitable instructions, then the operator was a fellow servant of respondent at the time he negligently failed to replace the guard.

Cases of this kind differ from those where, under the common law, the master is charged with the duty of providing a safe place and proper tools and instrumentalities. In those cases the exercise of reasonable care only is required. But with reference to dangerous machinery which it is practicable to guard the rule has no application. The statute has adopted the rule of absolute duty. The master cannot delegate the performance of the act to another and thus avoid responsibility. Baddeley v. Granville, 17 Eng. R. Cas. 212; Britton v. Great Western, 19 Eng. R. Cas. 42; Groves v. Winborne, 2 Q. B. Div. 402 (1898); Sommer v. Carbon Hill Coal Co., 89 Fed. 54, 32 C. C. A. 156; Lore v. American, 160 Mo. 608, 61 S. W. 678.

It is unnecessary for the purposes of this case to consider what the limitations of the application of this rule may be in cases where those intrusted with the duty of maintaining such guards negligently remove them contrary to instructions. There is much room for discussion and difference of opinion upon that branch of the subject. Whether

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there be any logical distinction we need not now determine. So far as the facts of this case are concerned there should be no hesitancy in applying the rule of absolute nondelegable duty. The operator was required, in the performance of his duties, to remove the guard in order to put on another wheel. It then became the duty of the master to furnish the new wheel with a guard, to the same extent as in the first instance, when the guard was furnished. To that extent the master selected the operator as his representative, and his failure to attach the guard was the master's act.

The instructions to the jury were quite as favorable as appellant was entitled to, and we discover nothing prejudicial in the reference by the court to the master's duty to provide a reasonably safe place for the employees.

The verdict was large, but we cannot see that it was excessive.

Affirmed.

ELLIOTT, J. (dissenting).

I am not able to see why Sandstrom and the respondent Davidson were not fellow servants. They were ordinary operatives, each engaged in his own work. Neither had any control over the other. Sandstrom removed the cover from the emery wheel for the purpose of changing the wheel and carelessly started the machine without replacing the cover. The appellant had complied with the statute, and but for the negligence of Sandstrom the accident could not have occurred. The employer had done everything it was possible to do, and if the fellow servant rule is in force in this state, the plaintiff should not have recovered a verdict. I therefore respectfully dissent.

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JOHN M. REES v. CITY OF MINNEAPOLIS.[1]

January 22, 1909.

Nos. 15,964, 15,965—(243, 244).

Term of Office—Finding.

The evidence justified the trial court in finding that the term of office of the police officers referred to in Rees v. City of Minneapolis, 105 Minn. 246, expired on the seventh day of January, 1907.

After the former appeal, reported in 105 Minn. 246, judgments were entered in the district court for Hennepin county in favor of plaintiff for the sum of $252.43 for the wages of Officer Munger and $267.52 for the wages of Officer Quist. From these judgments plaintiff appealed because he was denied judgment for the services of his assignors between January 7, 1907, and March 21, 1907. Affirmed.

On the previous appeal it was held that the trial court was warranted in finding from the evidence that it had not been the intention of the mayor to suspend the officers without pay.

John M. Rees, pro se.

Frank Healy and *A. C. Finney,* for respondent.

LEWIS, J.

On the former appeal (Rees v. City of Minneapolis, 105 Minn. 246, 117 N. W. 432) we held that the police officers were entitled to receive compensation during the time they were suspended from duty, viz., from October 7, 1906, to January 7, 1907. The question presented upon this appeal from the judgment is whether the officers were entitled to draw salaries from the seventh of January to March 21, 1907.

Appellant claims that the decision on the first appeal is decisive of the question. The former decision was based upon the ground that under the provisions of the city charter the control of the police force was vested in the mayor, and that for the purpose of discipline the mayor was authorized to suspend police officers, with or without pay, and that under the peculiar circumstances developed by the evidence

[1] Reported in 119 N. W. 484.

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the trial court was justified in finding that it was not the intention of the mayor to do any more than suspend the officers pending an investigation into their conduct, and that there was no intention to deprive them of their compensation in the meantime.

On the seventh of January a change took place in the administration, and a new mayor took office. The trial court found that upon the installation of the new mayor the names of these officers were stricken from the rolls, and that they were not reappointed. The mayor thus indicated that it was his intention not to retain the men in the service. It is true that the officers were not required to deliver up their insignia of office until the twenty first of March; but there is evidence reasonably tending to show that during the intervening period the officers fully understood their relation to the administration—that they had not been reappointed and were not considered as hold-over appointees. The fact that the insignia of office were not called for until the twenty first of March did not, in itself, conclusively indicate an intention on the part of the mayor to recognize them as hold-over appointees, and his failure to demand their badges of office is not inconsistent with the intention expressed by having their names taken from the rolls. The evidence is sufficient to support the judgment.

Affirmed.

ELLIOTT, J. (dissenting).

If the decision on the former appeal was correct, this decision is wrong. Having approved the former decision, and desiring to be reasonably consistent, I therefore respectfully dissent.

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JENNIE M. WEHRING v. MODERN WOODMEN OF AMERICA.[1]

January 22, 1909.

Nos. 15,989—(105).

Life Insurance.

Action to recover on a beneficiary certificate issued by defendant, in which the plaintiff was named as the beneficiary. The issue was whether the insured was dead. Verdict for the plaintiff.

Held, that the record does not raise any question of the sufficiency of evidence to support the verdict; that the trial court did not err in denying the defendant's motion to postpone the trial on account of an absent witness, nor in receiving parol evidence of the contents of a published notice in reference to the disappearance of the insured, nor in refusing defendant's requests for instructions to the jury, which, so far as they were correct, were covered by the general charge.

Action in the district court for Ramsey county to recover $1,000 upon a benefit certificate. The case was tried before Brill, J., and a jury which on March 5, 1908, returned a verdict in favor of plaintiff for $1,048.33, and a stay of forty days was entered. On May 2, 1908, defendant moved for judgment notwithstanding the verdict or for a new trial. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

Portions of the charge to the jury were as follows: "It is a principle that where a person has been continuously absent from his home or place of residence for a period of seven years or more, and his absence is unexplained, and no tidings have been received from him by any of those who would be likely to receive such tidings, it is presumed that he is dead, and it is upon this presumption that the plaintiff relies and seeks to recover in this case." * * * "The burden is upon plaintiff to establish the case by a fair preponderance of the evidence, that is, it must appear by the evidence that Daniel Wehring has been absent from his home and usual place of residence for at least seven years, that no tidings have been received from him during that period by those who would be likely to have received such tidings, and that his absence is unexplained. If these facts appear

[1] Reported in 119 N. W. 245.

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in the case to your satisfaction, the presumption arises that he is dead and the plaintiff is entitled to recover. If, on the other hand, the evidence fails to satisfy you upon any one of these points, then the plaintiff is not entitled to recover. That presumption does not arise.

Benj. D. Smith and *Percy D. Godfrey,* for appellant.

H. A. Hageman, for respondent.

START, C. J.

The defendant is a fraternal association, and on March 14, 1892, it issued its benefit certificate in the sum of $1,000 to Daniel Wehring, the then husband of the plaintiff, wherein she was named as the beneficiary. She brought this action in the district court of the county of Ramsey to recover the amount of such certificate. The complaint alleged the execution of the certificate and that the insured was dead. The answer admitted the execution of the certificate, but denied that the insured was dead.

On the trial of the issue there was no direct evidence of the death of the insured; but there was evidence tending to show that he left his home more than seven years next before the commencement of the action, that his absence was unexplained, and no tidings of or from him had been received. The issue was submitted to the jury with appropriate instructions, and on March 5, 1908, a verdict returned for the plaintiff. It appears from the record that the motion for judgment notwithstanding the verdict or for a new trial was made; but it does not appear that the trial court ever considered the motion on its merits. On the contrary, it may be fairly inferred from the record that the court declined to so hear the motion because it was not seasonably made. Judgment was entered on the verdict on May 12, 1908, from which the defendant appealed.

No question of the sufficiency of the evidence to sustain the verdict is attempted to be raised by any assignment of error except the sixteenth, which is to the effect that the court erred in refusing to grant the defendant's motion for judgment or a new trial. There is nothing in the record to base this assignment upon, if it is intended to raise the question of the sufficiency of the evidence; for the motion was never heard on its merits. It follows that the question whether the verdict is sustained by the evidence is not before us, and that only

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such other assignments of error as are urged in appellant's brief are before us for consideration.

1. The first alleged error urged by the defendant is that the trial court erred in denying its motion to reset or continue the case to enable it to procure the attendance of a witness residing in Chicago, or to take his deposition. The motion was addressed to the discretion of the trial court. The affidavit upon which the motion was based stated that Martin Mohoney, residing in Chicago, had been interviewed by a disinterested person, who was not named in the affidavit, and that he would testify that he saw the insured at Chicago within five years then last past. The affidavit also stated the steps taken by defendant's counsel to get into communication with Mohoney, but it was indefinite in important particulars. The opposing affidavit disclosed facts tending to show that, if the city directory of Chicago had been examined, Mohoney's name and street number could have been readily found. Upon a full consideration of the affidavits we are of the opinion that the trial court did not abuse its discretion in denying the motion.

2. The plaintiff called as a witness the clerk of Camp No. 674 of the defendant, located at St. Paul, of which the insured was a member. The witness testified to the effect that a notice of the disappearance of the insured, with a request for information from any one knowing of his whereabouts, was prepared by the witness at the request of the plaintiff; that he mailed it to, and it was published in, a newspaper, the official organ of the defendant, known as the "Modern Woodman," published at Indianapolis, Indiana; that he read the notice in his copy of the paper, which he did not preserve; that his camp did not keep files of the paper; that he inquired of one or two clerks of other camps whether they kept files of the paper, and was answered in the negative; and, further, that he did not know of any such files in this state. He was then asked to state the substance of the notice that was so published. The defendant objected to the question as immaterial and no foundation laid. The objection was overruled, and the witness answered the question. The ruling is assigned as error. The question whether a sufficient foundation for the admission of secondary or parol evidence of the contents of a writing has been laid is a preliminary one for the trial judge, whose decision thereon will not be

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reversed on appeal, unless it is manifestly against the weight of the evidence and to the injury of the appellant. City of Winona v. Huff, 11 Minn. 75 (119); Yorks v. Mooberg, 84 Minn. 502, 87 N. W. 1115; Wigmore, Ev. § 1252. The degree of proof required to lay the foundation for secondary or parol evidence of the contents of a written instrument depends upon the circumstances of each particular case, such as the character of the instrument, its relation to the issue, and whether the original is within or without the jurisdiction of the court. Where the instrument is the foundation of the action or defense, stricter proof should be required than in a case where the existence and contents of a writing are only incidentally or collaterally involved. See 17 Cyc. 508. Now in the case under consideration the original writing was the notice sent out of the state to the Modern Woodman for publication. The published notice was not the foundation of the plaintiff's action, but only a collateral fact relevant to the question of diligence in making inquiry for the whereabouts of the insured. It would seem that in such a case it would not be necessary to lay any foundation. 21 Am. & Eng. Enc. (2d Ed.) 1087. The evidence, however, was ample to sustain the decision of the trial judge to the effect that a proper foundation had been laid for the admission of the parol evidence. It was not error to receive it.

3. The remaining assignments of error relate to the refusal of the trial court to give certain requests for instructions to the jury. Such requests related to the presumptions arising from the unexplained absence of a person from his home for a period of more than seven years and the law applicable to such a case. Some of the requests were correct in form and substance. Others were incorrect or argumentative, and liable to mislead the jury. We have compared the requests with the instructions given by the court to the jury, and find that all of the defendant's requests which it was entitled to have given to the jury were substantially and fairly given in the general charge. It follows that it was not error to refuse the requests, or any of them.

The court directed the jury, in case they found for the plaintiff, to allow interest from May 18, 1907, when proofs were made and liability denied by defendant. This is claimed to be error, for the reason that no interest should be allowed before a verdict. The court was correct.

Judgment affirmed.

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HENRY J. PETERS v. GUSTAV C. SCHULTZ and Another.[1]

January 29, 1909.

Nos. 15,801—(155).

Gift of Promissory Note—Evidence.

Action upon a promissory note executed by the defendants to plaintiff's intestate. The defendants claimed that the deceased made a gift of the note to his daughter, one of the defendants. *Held*, that the verdict for the plaintiff is sustained by the evidence, and that the trial court made no reversible errors in its rulings on the admission of evidence.

Action in the district court for Ramsey county by the administrator of the estate of Carl Peters, deceased, to recover $1,800, balance due upon a promissory note. The answer admitted the making of the note and set up that the intestate surrendered the note to his daughter, the defendant Amelia K. Schultz, as a gift. The case was tried before Olin B. Lewis, J., and a jury which returned a verdict in favor of plaintiff for $1,794.21. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendants appealed. Affirmed.

Owen Morris, for appellants.

John D. O'Brien and *John Dillon O'Brien,* for respondent.

START, C. J.

On March 16, 1902, the defendants executed to Carl Peters, the plaintiff's intestate, their promissory note dated on that day, and thereby for value received promised to pay to his order $2,000 two years after date, with interest payable annually at the rate of five per cent. per annum. This is an action brought in the district court of the county of Ramsey by the plaintiff, as administrator of the estate of the payee, to recover a balance due on the note. The complaint alleged the execution of the note. The answer admitted the making of the note, and alleged as a defense that the payee of the note, on September 20, 1905, surrendered and absolutely gave the note to his daughter, the defendant Amelia K. Schultz. The reply denied the alleged gift. This is-

[1] Reported in 119 N. W. 385.

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sue was submitted to a jury and a verdict returned for the plaintiff. The defendants made a motion for judgment in their favor notwithstanding the verdict, or for a new trial, and appealed from an order denying their motion. The assignments of error raise two general questions.

1. The first one is to the effect that the defendants were, upon the evidence, entitled to an instructed verdict in their favor; hence the court erred in not granting their motion for judgment, or a new trial. To justify a judgment in any case notwithstanding the verdict, the undisputed evidence and the only inferences which can reasonably be drawn therefrom must be such as to require, as a matter of law, a directed verdict for the moving party. The record shows that the defendant Mrs. Schultz testified to facts tending to establish the gift. She was also corroborated indirectly by the testimony of other witnesses tending to show statements of her father to the effect that he had not done as much in a pecuniary way for her as he had for his other children, that she was more deserving than they, and that he was going to do something for her. On the other hand, there was evidence tending to show conduct on the part of the defendants inconsistent with the claim of a gift of the note to Mrs. Schultz; that two payments of $200 each were indorsed on the note on different dates by direction of his wife, after the date of the alleged gift; and, further, that no claim was made by the defendant Mrs. Schultz that her father had given the note to her until after his death, nor until a controversy had arisen over his alleged lost will. The plaintiff as a witness on his own behalf testified that in his father's will, which he read before it was lost, the children of the testator were severally charged with a named sum as an advancement, and that Mrs. Schultz was charged therein with $1,800 as an advancement, the amount claimed by the plaintiff in this action to be due upon the note. He further testified on cross-examination as follows: "Q. And you are in this case suing her for the $1,800 which your father had given her; is that right? A. Not given her; given as an advancement; not supposed to be a gift in that will. Q. You are in this case suing her for $1,800 which your father had given her as an advancement? A. Yes, sir."

It is urged by the defendant that this evidence shows that the note, according to the claim of the plaintiff was given to Mrs. Schultz

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as an advancement, and therefore, if such were the case, the father could not thereafter have maintained an action on the note, nor can his administrator do so; hence the defendants are entitled to judgment in their favor notwithstanding the verdict. The evidence does not justify this conclusion, for the plaintiff's alleged cause of action is not upon an advancement made to Mrs. Schultz, but on the note. The evidence was evidently offered as an act and declaration of the deceased payee, tending to show that he had not made a gift of the note to his daughter as she claimed; for, if he made an absolute gift of it to her, the amount due thereon could not be charged as an advancement against her interest in the estate. The will was never probated, for the reason that it could not be found after the testator's death, and the attempt to probate it as a lost will failed. Therefore it never became operative, and was not proof of an advancement. It follows that the undisputed evidence did not require an instructed verdict for the defendants, and that so much of their motion as asked for a judgment notwithstanding the verdict was properly denied. Nor did the trial court err in denying the motion for a new trial. The jury were not bound to accept as true the testimony of the daughter that her father made an absolute gift of the note to her, for the evidence clearly made the question of her credibility one for the jury. Lang v. Ferrant, 55 Minn. 415, 57 N. W. 140.

2. The remaining assignments of error relate to the rulings of the trial court as to the admission of evidence. It is urged in this connection that it was error to admit evidence with reference to the contents of the will. As we have suggested, it was not an attempt to prove a will, but simply to show an act and declaration of the deceased payee inconsistent with the claim that he had made an absolute gift of the note. The defendants had offered evidence, which was received, of the acts and declarations of the payee tending to show the relations between him and his daughter, and tending indirectly to corroborate her claim. If such evidence on the part of the defendants was relevant and properly received, and it was, surely evidence of like character on behalf of the plaintiff, tending in some degree at least to rebut her claim, was also relevant and properly received. The plaintiff testified in effect that the defendants had possession of a box in which his father was accustomed to keep his papers; that in searching for

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the lost will he went to the house of his sister, Mrs. Schultz, to look in the box for the will, and in a conversation with her he said that their father told him there was $100 in the box which was to be used for funeral expenses; that she replied that their father told her there was $100 in the box which the children could divide among themselves.

This evidence was received over the objection of defendants that it was not competent for the plaintiff to testify of or concerning any conversation with his deceased father, and that in so testifying he was doing indirectly that which the statute (R. L. 1905, § 4663) forbade. A party to an action or any person interested in the event thereof cannot testify as to a conversation with or admission of a deceased person relative to any matter at issue. This provision cannot be evaded by indirection; but a reading of the testimony does not justify the conclusion that there was any attempt by the witness to evade the statute. On the contrary, it appears that the statement of the father referred to was a mere incident in a conversation between the brother and sister, which was given in evidence to show the admission of the defendant Mrs. Schultz that she had been told by the father that the box contained $100. Again, the statement of the father was only indirectly relevant to the issue, if at all; but it was not objected to on the ground that it was immaterial. We are of the opinion that under the circumstances disclosed by the record the trial court did not err in permitting the plaintiff to testify to the conversation between himself and the defendant Mrs. Schultz on the ground urged. See Hirsh v. Auer, 146 N. Y. 13, 40 N. E. 397, and Ladd v. Brown, 108 Mich. 105, 65 N. W. 520.

A number of other alleged errors are assigned as to other rulings of the trial court on the admission of evidence. We have examined them all. Much of the proposed evidence, which was excluded on the objection of the plaintiff and herein made the basis of many of the assignments of error, related to collateral matters which it is claimed would have tended to show that the testimony of the defendants as to the alleged gift was reasonable and therefore credible. The proposed evidence was to the effect that the father and his daughter Amelia had secrets of which his other children did not know, that he had expressed friendship and affection for each of the defendants, that he told a third person not to tell any one that he had seen him go to his

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daughter Amelia's house, and that his other children did not want him to visit her. The extent to which evidence of this character may be received rests in the fair discretion of the trial court. Philips v. Mo, 91 Minn. 311, 97 N. W. 969. The trial court received evidence tending to show the relations between defendant Mrs. Schultz and her father and his statements as to his intention to provide specially for her. The court did not abuse its discretion in rejecting the proposed cumulative evidence.

We find no reversible error in the other rulings of the trial court.

Order affirmed.

HOWARD F. LINK v. NEW YORK LIFE INSURANCE COMPANY.[1]

January 29, 1909.

Nos. 15,820—(160).

Recovery of Insurance Premiums Paid—Minor.

This, an action brought to recover life insurance premiums paid by plaintiff when an infant, is *held* to be controlled by Johnson v. Northwestern Mutual Life Insurance Co., 56 Minn. 365. On the findings of the trial court and the notice of appeal a new trial must be granted. Plaintiff is precluded from disaffirming the contract by his conduct subsequent to his maturity, unless relieved from its consequences by facts in connection with alleged fraud.

Action in the municipal court of St. Paul to recover $156.96 paid by plaintiff while a minor as premiums upon a policy of insurance upon his life. The complaint alleged fraudulent representations on the part of defendant's agent, a train dispatcher in the office of a railroad company for which plaintiff was working as telegraph operator, and that plaintiff, immediately after he became of age, disaffirmed the contract, and notified defendant thereof. The answer denied the fraud, and set up various payments by plaintiff upon the policy after he arrived at his majority. According to his application the plaintiff reached his majority on September 30, 1905. According to his testimony

[1] Reported in 119 N. W. 488.

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on the trial he became of age on September 30, 1907. He disaffirmed the contract on February 6, 1908. The case was tried before Finehout, J., who made findings and as conclusions of law found that the policy in question was not a necessity to the infant plaintiff at the time he procured it; that he took it under a species of duress and that it was improvident for him to take it in view of his pecuniary situation at the time; that when plaintiff took the policy, he didn't understand it and believed he was securing greater benefits than the policy in terms gave him, and, on coming of age, he disaffirmed it within a reasonable time and tendered back the policy; that plaintiff is entitled to the sum demanded. From an order denying defendant's motion for an order vacating the decision of the court and granting a new trial, it appealed. Reversed.

Brown, Albert & Guesmer, for appellant.

W. E. Barnacle and *Harris Richardson,* for respondent.

JAGGARD, J.

Plaintiff and respondent brought action to recover back premiums paid by him to the defendant and appellant on a life insurance policy. He claims that he was a minor when the policy was delivered. His application stated that he was nineteen years of age. On trial he testified that he was then in fact two years younger. During his minority, when the premiums were paid, the policy was at his request changed so as to run in favor of his wife, instead of his mother. About three months and twenty one days after he became of age he disaffirmed the contract. Prior to that time, and after his minority, he wrote a letter to the defendant applying for a loan on the policy, and stating that he did not request any assistance on the payment of the premium next due. The loan was not in fact made. The trial court ordered judgment for the plaintiff in amount asked for. This appeal was taken from the order denying the defendant's motion for a new trial.

This appeal is controlled by Johnson v. Northwestern Mutual Life Ins. Co., 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. 473. It was there held that "where an infant seventeen years old obtains a policy of insurance, upon which he pays the premium and makes several semiannual payments during his minority, but disaffirms the contract immediately upon his becoming of full age, and

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offers to surrender the policy to the insurance company, and demands the return of the money so paid, he can, in case of refusal, maintain an action for its recovery." On reargument the original decision was overruled. It was held (per Mitchell, J.): "Where the personal contract of an infant is fair and reasonable, and free from any fraud, overreaching, or undue influence by the other party, and has been wholly or partly executed on both sides, so that the infant has enjoyed the benefits of it, but has parted with what he received, or the benefits received are of such a nature that he cannot restore them, he cannot recover what he has paid." Defendant has directed our attention to Simpson v. Prudential, 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. 560. An examination of that case has tended to confirm the propriety of adhering to Judge Mitchell's views on this subject. However, plaintiff advises us that he "stands upon the Johnson case and asks the court to adhere to its principles and doctrines."

Three considerations are urged as differentiating the application in this case of the rule as there laid down. Of these, the first is without merit, namely, that the beneficiary was not the estate of the assured, but originally his wife, and finally his mother. In case of death, the money could not have gone to the insured personally; and it is not here material whether it went to his estate, or to persons designated by the intestate act or by his will, or to persons named by him during his life. In case of distribution during his lifetime, the proceeds would have gone to his mother, whom he was under obligation to aid when the policy was taken.

In the second place it is urged that the lower court found that fraudulent and deceptive "misrepresentations were made to him [respondent] by appellant through its agent" in procuring this contract of insurance. The trial court did not so expressly find. It found that the insurance was taken under a "species of duress." Viewed most favorably to the plaintiff, the evidence tended to show that plaintiff took the insurance because he was afraid that he would otherwise lose his position with a railroad company. No facts were proved or found which reasonably could be, or which were, contended to constitute legal duress.

In the third place the trial court did find that "it was improvident for [the assured] to take it [the policy] in view of his pecuniary situa-

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tion at the time." The annual premium was $39.24. Plaintiff was earning $600 a year. He was "required to aid his parents as much as he could." There was nothing in this situation or in the character of the contract which renders the policy an improvident one for the plaintiff to procure. Elliott, Ins. § 11. It follows that a new trial must be, and it is, hereby ordered.

It will conduce to certainty on that trial to here express the opinion that in view of the delay during which plaintiff enjoyed the profits of insurance he had taken, and in view of his letter to the company written after his majority, he is in no position to disaffirm the contract and recover back the premiums he had paid, unless relieved by facts in connection with alleged fraud.

Reversed.

ERICK NORTON v. CARL FREDERICK and Another.[1]

January 29, 1909.

Nos. 15,875—(213).

Land Grant—Sale of Right to Indemnity Lands.

The right to indemnity land under the act of congress of 1866, granting certain lands to the state to aid in the construction of a railroad from Hastings to the western boundary of the state, conferred upon the Hastings & Dakota Railway Company by the state legislature, and the right to select the same to supply deficiencies in the place limits of the grant, became fully vested in the railway company on the completion of its road, was a substantial property right, and subject to sale and assignment by the railway company.

Same—Selection of Indemnity Lands.

The sale and transfer of that right by the Hastings & Dakota Railway Company to Russell Sage within three years after its dissolution was authorized by section 3431, G. S. 1894, and vested in Sage the right to make such selections as the corporation could have made, had it not been dissolved.

[1] Reported in 119 N. W. 492.

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Action to Recover Possession.

The legal title to real property carries with it the right of possession, which is sufficient, under section 4073, R. L. 1905, to authorize an action to recover the same from one in possession thereof without right or title.

Action in the district court for Swift county by a grantee of Russell Sage, as assignee in trust and trustee of the Hastings & Dakota Railway Company, to recover possession of certain land between ten and twenty miles distant from that railroad which had been selected by Russell Sage in lieu of place land from free public land which the United States had not sold, reserved or otherwise appropriated, and to which the right of homestead or pre-emption settlement had not attached. The separate answer of Edward Frederick alleged that neither plaintiff, his ancestor, predecessor nor grantor, had been seised and possessed of the land within fifteen years next preceding the commencement of the action, that it was barred by the statute of limitations, and that defendant had acquired title by adverse possession. It appeared that defendant had not made any application to enter the land. The case was tried before Qvale, J., who made findings and ordered judgment in favor of plaintiff. Defendant's motion for a new trial was denied. From the judgment entered pursuant to the order, defendant Edward Frederick appealed. Affirmed.

A. D. Countryman and *C. A. Fosness*, for appellant.

In State v. Minnesota Central Ry. Co., 36 Minn. 246, the charter of the Hastings & Dakota Railway Company was forfeited. If the charter of the corporation is repealed by a valid act of the legislature, its dissolution takes effect at the time when the repealing act takes effect and is not postponed by statute continuing the corporate faculties for three years for the purpose of winding up its affairs. 5 Thompson, Corp. § 6744; Crease v. Babcock, 23 Pick. 334. On December 9, 1889, about three months before the time expired in which it was given to wind up its affairs, the company conveyed to Russell Sage, as trustee, the land which it then owned and in addition assumed to transfer to him its interests in the land grant. This transfer was not for the benefit of creditors, but for the exclusive benefit of the preferred stockholders of the company. This is not one of the purposes for which

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the company had its existence continued under G. S. 1894, § 3431, and Mr. Sage had no right to make any selection of any indemnity land.

When a corporation is dissolved it ceases to be a corporation for the purpose of continuing the business for which it was established. It retains only power to gradually settle and close its concerns and upon appointment of a receiver that power is placed in him, and its property and assets are in custodia legis. After dissolution it has no power to perform its contracts, even though made with third parties. "The rights of the parties to them were fixed as of the date of the dissolution." In re Educational Endowment Assn., 56 Minn. 171; Mumma v. Potomac Co., 8 Pet. 281. The case of Hanan v. Sage, 58 Fed. 651, is not in point. The tract of land involved in that action was within the place limits and the rights of the Hastings & Dakota Railway Company to that particular land became fixed at the time of the filing of the map of the definite location. The company was the absolute owner of the land involved in that case and the courts simply held that during the three years allowed it to wind up its affairs it could convey this tract of land, but did not hold that this deed of trust could in anywise prolong the life of the corporation, as it necessarily must in case it had a right to make any selection in 1891.

Lyndon A. Smith and *Owen Morris,* for respondent.

The government has given indemnity lands to the predecessor in interest of the respondent. The act of congress by which they were given was passed in 1866, and, if the Hastings & Dakota Railway Company ever obtained any right to any indemnity lands, it obtained that right by the construction of a railroad pursuant to the terms of the grant of 1866, and when such road was constructed it had a right to the indemnity lands promised and provided for by the act of congress, and that right was a vested one and could be assigned from one person to another so long as it had been earned and had been vested, and such transfer did not affect the relations of the United States to the land. Courts have upheld and now are universally upholding the validity of an assignment of unallowed claims against a government, when such assignment in no way interferes with the government. It was held in York v. Conde; 147 N. Y. 486, that an assignment of a claim against the government was good as between the parties, al-

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though not recognized by the government itself. In the case in hand the transfer attacked by appellant was not only good between the parties, but has been expressly recognized by the United States government.

The decisions of Minnesota have been favorable to the validity of assignments of all forms of property and all rights of property when any right whatever which might prove of value had a present existence, which might ripen into a valuable property right. The right to claim indemnity lands has been recognized by all courts as a valuable right and has brought to the railroad companies and their assignees thousands of acres of land without any restriction from the government, except a compliance with the terms of the grant, and the fact that this land was certified to the trustee of the Hastings & Dakota Railway Company proved that all the conditions of the grant had been complied with. Musser v. McRae, 44 Minn. 343; Minnesota Land & Inv. Co. v. Davis, 40 Minn. 455; Winona & St. Peter Land Co. v. Ebilcisor, 52 Minn. 312.

Settlement upon public land for years, without any other act or thing looking toward acquiring a title, is absolutely void and null. 26 Am. & Eng. Enc. (2d Ed.) 228, particularly cases cited in note 2.

BROWN, J.

In 1866 the congress of the United States, by an act approved July fourth of that year (Act July 4, 1866, c. 168, 14 St. 87), granted to the state of Minnesota to aid in the construction of a railroad from Hastings to the western boundary of the state certain lands, consisting of the odd-numbered sections within a belt of ten miles on each side of the road when definitely located. The act also provided for the selection of lands within twenty miles of the road as so located to supply any deficiency in the place limits arising from a disposal thereof by the government before the location of the road. The lands so authorized to be selected are known as indemnity lands, the title to which passes from the government only upon selection by the company and approval by the secretary of the interior. The state accepted the grant in 1867, by chapter 9, p. 11, of the special laws of that year, and duly vested the same in the Hastings & Dakota Railway Company. The company filed its map of definite location on June 26, 1867, and

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completed the construction of the road by January 1, 1880. Thereafter, in 1886, the charter of the company was declared forfeited by judicial decree entered in proceedings brought for that purpose. State v. Minnesota C. R. Co., 36 Minn. 246, 30 N. W. 816.

Within three years thereafter, the time limited by statute within which corporations dissolved or whose charters expire by limitation may close up their affairs by sale and disposal of their property and payment of their debts, the railway company assigned and transferred to Russell Sage, in trust for the benefit of preferred stockholders, all its land grant rights, which necessarily included the right to select the indemnity lands to supply losses within the place limits of the grant, if that right was assignable. There was a deficiency of place lands, and Sage duly selected the land in controversy in this action, and other lands within the indemnity limits, to supply the same. The selection was approved by the Interior Department in 1901, and the land so selected subsequently transferred and conveyed to Sage. Plaintiff, as successor to the Sage title, brought this action to recover possession of the land in suit against the defendant, who is in possession thereof claiming to own the same. The defense interposed by the answer was that defendant had acquired title to the land by adverse possession. The defense was not, however, made out on the trial. Though defendant showed by his evidence that he and his predecessors in right had been in the actual and continuous possession of the land since 1885, more than twenty years, no right accrued therefrom; for until 1901 the title was in the general government, against which the statute of limitations does not operate. Judgment was ordered for plaintiff in the court below, and defendant appealed from an order denying his motion for a new trial.

Two questions are presented by the assignments of error: (1) Whether Sage, as successor to the rights of the railway company, had the right to make a selection of indemnity lands to supply deficiencies in the place limits; and (2) whether plaintiff, since neither he nor his predecessor in title, Sage, has ever had the actual possession of the land, can maintain ejectment therefor.

1. The first question was for all practical purposes settled by the decision of this court in Sage v. Crowley, 83 Minn. 314, 86 N. W. 409. The same question was there presented, though in a different form,

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and disposed of adversely to the defendant's present contention. Section 3431, G. S. 1894, which was in force when this corporation was dissolved, as hereinbefore stated, provides "that corporations whose charters expire by their own limitations, or are annulled by forfeiture or otherwise, shall, nevertheless, continue bodies corporate for the term of three years after the time when they would have been so dissolved, for the purpose of * * * enabling them gradually to settle and close their concerns, to dispose of and convey their property, and to divide their capital stock." It was said in the Crowley case, just referred to, that the statute recognizes the right of a corporation to dispose of its property for the benefit of its stockholders at any time within three years after its dissolution, and that such distribution may be by free gift to a trustee for the benefit of the interested parties or by an absolute sale for cash. We follow and apply that decision. That the right to select indemnity lands to supply any deficiency within the place limits under grants of the character of that here involved is a property right, and subject to sale or assignment, there can be no serious question.

The company in this case had by the construction of its road earned the lands granted long before its dissolution, and was entitled, if a loss was found within the place limits, to select in lieu thereof a sufficient quantity from the indemnity tract to supply the same. This right became vested immediately upon the completion of the road, and was corporate property within the meaning of the law, subject to sale and assignment. Hanan v. Sage (C. C.) 58 Fed. 651; Kansas P. R. Co. v. Atchison, T. & S. F. R. Co., 112 U. S. 414, 5 Sup. Ct. 208, 28 L. Ed. 794; Cedar Rapids & M. R. R. Co. v. Herring, 110 U. S. 27, 39, 3 Sup. Ct. 485, 28 L. Ed. 56; Hastings & Dakota R. Co., 18 Land Dec. Dep. Int. 511. This right in the case at bar was conveyed to Sage before the expiration of the limitations prescribed by statute after the dissolution of the corporation, and fully vested in him the right to make such selection of indemnity lands as the corporation could have made, had it not been dissolved. It is not important that the right was assigned to him for the benefit of preferred stockholders, when perhaps it should have been assigned for the benefit of creditors generally. Whether the creditors had rights in the premises does not concern defendant in this case.

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2. It is further urged that, because neither plaintiff nor Sage has ever been in the actual possession of the land, ejectment cannot be maintained. This contention is founded upon section 4073, R. L. 1905, which provides that "no action for the recovery of real estate, or the possession thereof, shall be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within fifteen years before the beginning of the action."

The fact that neither plaintiff nor Sage had ever been in the actual possession of the land is not questioned; but, with this conceded fact in mind, we are unable to concur in defendant's construction of this statute. It has always been understood, so far as we are advised, as a statute of limitations, and not as one requiring a plaintiff in an action of this character affirmatively to show actual possession in him as a condition precedent to the right to maintain an action in ejectment. Title and right of possession within the time limited are all that need be shown. Garrett v. Ramsey, 26 W. Va. 345; Seymour, Sabin & Co. v. Carli, 31 Minn. 81, 16 N. W. 495. If actual possession of land within fifteen years is necessary to maintain an action to recover the same from one in actual possession thereof, whether as trespasser or otherwise, the courts would undoubtedly be relieved of considerable litigation, and the transfer of title to vacant and unoccupied lands would correspondingly decline. No person would be safe in owning vacant and unoccupied land. But the contention of counsel is not sound. The legal title to real property carries with it the right of possession, and this is all that is necessary under the statute to entitle him to maintain an action to recover the same against one in possession thereof without right. It is sufficient until an adverse occupant has remained in possession a sufficient length of time to divest the legal title. If defendant acquired any title or right to the land by reason of his settlement thereon, or the settlement of his predecessor, he should have presented his case to the Interior Department for adjustment.

Judgment affirmed.

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SOPHIE HEINZE v. JULIUS A. HEINZE.[1]

January 29, 1909.

Nos. 15,892—(136).

Limited Divorce.

Under a complaint for an absolute divorce on the ground of cruel and inhuman treatment, a court may grant a limited divorce. Wagner v. Wagner, 36 Minn. 239, followed and applied.

Finding Insufficient.

A finding that the conduct of a husband to his wife was "improper" does not conform to the requirements of the second subdivision of section 3508, R. L. 1905.

Same—Evidence.

Findings that allegations of a complaint were true, except as to personal assaults and refusal to furnish medical aid, *held* to have been insufficient to sustain an order granting a limited decree, because the allegations as to such assaults and medical aid were so interwoven with other allegations of cruel and inhuman treatment, and the evidence pertinent to each so interrelated, that on the exclusion of assaults and medical aid not enough remained to make out a case of cruel and inhuman treatment.

Action in the district court for Ramsey county for divorce on the ground of cruel and inhuman treatment and for alimony. The case was tried before Kelly, J., who made findings and as conclusions of law found plaintiff was not entitled to an absolute divorce, but ordered that plaintiff have judgment separating her from the bed and board of defendant until the further order of the court, and for her support the sum of $75 per month, the same to be made a specific lien upon defendant's real property. Defendant's motion to strike out certain of the findings was denied. From the judgment entered pursuant to the findings, defendant appealed. Reversed.

A. F. Storey and *Durment & Moore,* for appellant.

Otto Kueffner, for respondent.

JAGGARD, J.

Plaintiff and respondent brought an action against her husband for a divorce, for alimony, and "for such other and further relief as to the

[1] Reported in 119 N. W. 489.

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court may seem meet and proper." Defendant's answer denied the allegations of the complaint as to cruel and inhuman treatment alleged therein, and set forth facts as to his ability to pay alimony, and prayed that the action be dismissed. The trial court granted plaintiff a divorce from bed and board and required defendant to pay $75 per month alimony.

The first question presented upon this appeal is whether the court could grant a separation, or was limited to granting or refusing an absolute divorce. It was pointed out in Wagner v. Wagner, 36 Minn. 239, 30 N. W. 766, that "the formal allegations required in the complaint [for absolute divorce] include everything that is required in the complaint [for a limited divorce]. Cruel and inhuman treatment, as a cause for divorce, is common to both. The two actions are intimately related to each other. The relief asked for in an action for absolute divorce may be said to include the relief asked for in an action for limited divorce, in the same sense in which the whole includes the part. They seek for different degrees of change in the marriage relation, and concern the same subject-matter. Fera v. Fera, 98 Mass. 155." And see Grant v. Grant, 53 Minn. 181, 54 N. W. 1059; Salzbrun v. Salzbrun, 81 Minn. 287, 83 N. W. 1088; Baier v. Baier, 91 Minn. 165, 97 N. W. 671. Consistently with this rule, we think that it is good practice to make clear in the complaint what sort of a divorce is sought, in order that the defendant may know exactly what he has to meet and prepare his evidence accordingly. The application of this principle, however, does not involve a reversal so far as this case is concerned. The complaint prays for other relief. The relief granted was a possible one on the facts alleged. Our attention is called to no evidence which the defense could have produced which would have put a different aspect upon the relations between the parties. We will not presume that such evidence existed.

The next question is whether the relief granted is justified by the facts which the court found to be true. The substance of its findings is as follows: That particularly during the last five years the course of conduct of the defendant towards the plaintiff has been inconsiderate and unkind to a degree that renders it improper for her longer to cohabit with him, and that, save as to the alleged personal assaults, found not true in the second finding, and the allegations of refusal by

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defendant of medical aid and services to his wife, which are also found not true, "the allegations of the complaint as to cruel treatment are true." It is certain that these findings would not justify adjudging a separation for the second ground specified in section 3598, R. L. 1905, namely, "Such conduct on the part of the husband towards his wife as may render it unsafe and improper for her to cohabit with him"; for the court found merely that the husband's conduct rendered it "improper," and not "unsafe and improper," for her to cohabit with him.

The essential question is, then, whether, excluding charges of personal assaults and refusing medical aid (found not to be true), the allegations of the complaint are sufficient to make out a case of cruel and inhuman treatment by the husband. The possibly resulting allegations are these: When the wife was sick, or complained, the husband would speak to her harshly and find fault with her, and claim that she was shamming, and repeatedly told her that if she did not want to work, or could not stand the work, she had better leave it, and he would get some one who could stand it. On a specified occasion he got very angry, and commenced to quarrel with her, and told her to keep still. At different times he quarreled with her and used bad language towards her, calling her names, saying that she was crazy, and applying improper epithets toward her in German and English. The husband allowed the wife to be insulted by the hired man, both in his presence and when he was not present, and whenever she complained about it he would side with the hired man and blame her. These allegations are so interwoven with charges of assaults and refusal to furnish medical aid, and the evidence pertaining to such assaults and failure is so interrelated with evidence as to other misconduct, that it is impossible to see how the limited divorce is sustained by the record, in view of the express findings of the court that those charges of assault and refusal of medical aid were untrue, or to hold that they constitute cruel and inhuman treatment, as this court defined it in Williams v. Williams, 101 Minn. 400, 112 N. W. 528.

The remaining question concerns the allowance of the alimony. It is clear that defendant had received a salary of $125 per month, and that he received rentals amounting to $75 per month. Defendant's full actual net income, however, was not actually shown. It is contended, and the record tends to sustain the contention, that counsel for defense

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were led to believe that, if any divorce was to be granted under the pleadings, it could be an absolute one only, involving a fair division of the property, and that no effort was accordingly made to show defendant's actual net income. In this respect, we think, defendant has been prejudiced by the form which the proceedings finally assumed.

Reversed.

BERNARD ELLERING v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.[1]

January 29, 1909.

Nos. 15,905—(217).

Eminent Domain—Appeal from Verdict.

In an appeal from a verdict in condemnation proceedings it is *held* that

1. Certain objections, not covered by assignments of error and not argued in appellant's brief on appeal, are not properly presented for consideration.

2. A notice of appeal from an award of commissioners to the district court, served after notice of filing of report, perfected the appeal, although a prior notice of appeal had been served before notice of filing had been given.

3. Alleged defects in the charge of the trial court are within Steinbauer v. Stone, 85 Minn. 274.

4. The trial court did not abuse its discretion in allowing plaintiff to open and close to the jury. Minnesota Valley R. Co. v. Doran, 17 Minn. 162 (188), followed.

5. Alleged erroneous ruling on evidence did not result in prejudicial error.

Condemnation proceedings in the district court for Stearns county. The commissioners appointed by the court awarded respondent the sum of $1,700. The defendant served notice of appeal immediately after the filing of the award, and later, after the commissioners had served the notice of filing of the award as provided by statute, defendant took a second appeal to the district court. The case was tried before Taylor,

[1] Reported in 119 N. W. 507.

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J., and a jury which assessed plaintiff's damages at $3,500. From an order denying a motion to vacate and set aside the verdict and grant a new trial, defendant appealed. Affirmed.

A. H. Bright and *Reynolds & Roeser,* for appellant.

J. D. Sullivan, for respondent.

JAGGARD, J.

The defendant and appellant railroad company sought to appropriate certain lands belonging to plaintiff and respondent by condemnation proceedings. The commissioners assessed damages to plaintiff at $1,700. The plaintiff served notice of appeal immediately after the filing of the report, and on the same day, and later on, after the commissioners had served notice of filing of the award, plaintiff took the appeal to the district court. There a jury awarded him damages in the sum of $3,500.

1. A meritorious contention by defendant is that "the damage awarded by the jury in this case was clearly excessive, and was not justified by the evidence." This was assigned as one of the grounds for a new trial. On appeal to this court, however, no assignment of error was directed to it, except this: "The court erred in denying appellant's motion for a new trial upon the several grounds alleged in the notice thereof." It is clear that this assignment is insufficient in itself. Moreover, the question was not argued in defendant's brief. Accordingly it is impossible for us to reverse on this ground.

2. It is also urged in argument in this court that the trial court erred in instructing the jury that it might take into account, in assessing damages, the inconvenience and damages to the landowner in crossing the railroad track on the public highway. It is very doubtful whether this was covered by the assignments of error. Present practice on that point is, however, extremely liberal. The consideration which finally determines that this question cannot be considered is that the point was raised for the first time upon oral argument in this court.

3. There is no merit to the assignment of error addressed to the alleged error of the court in refusing to compel the plaintiff to elect upon which appeal he would proceed to trial—the one taken before the serving of the filing of the award of the commissioners, or the one taken subsequent thereto. Section 2532, R. L. 1905, provides "that the ap-

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peal may be taken at any time within thirty days after service of the notice that the report has been filed." The trial court properly held that but one appeal had been taken. The notice of appeal given prior to the service of the notice that the report has been filed was of no legal validity. The district court heard the case upon the appeal perfected by the second notice.

4. The trial court did not submit to the jury the issue whether the tract of land was used as one farm and constituted but a single tract of land. Defendant contends that the trial court erred in assuming these facts as a matter of law. No request to charge on this point was made by defendant, and no objection to the charge given was made before it retired. Moreover, it was assumed throughout the trial that plaintiff's tract of land constituted one farm. Thus defendant's counsel asked a witness: "What in your judgment that tract of land, which consists of 394½ acres, is the entire farm, what in your judgment would be the reasonable market value of that land before the railroad went through there?" Under these circumstances, and upon the testimony contained in the record, no error appears. See Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754.

5. The trial court charged the jury that "the damages which the landowner is entitled to receive is the difference between the value of his farm taken as a whole before the locating and building of the railway across the same, and its value as a farm with the railway located upon the same as it now exists." The charge did not specifically say anything about the time, whether it was at the time of the trial or prior thereto. The plaintiff insists that it was susceptible of only one fair construction, namely, that the measure of damages was the difference in the value of the farm as it existed without any railroad upon it and what it was with the railroad located over it as shown at the time of the trial. With this view we do not entirely agree. If the court's attention had been called to the ambiguity as to time, or, as defendant insists, to the error in that regard, and after the court had refused to make the instruction the defendant had duly excepted, an assignment of error must have prevailed. No such objection was made. Moreover, in its charge to the jury the court said: "The amount of these damages is the only question for you to determine. There is no dispute as to anything else. There isn't even any dispute

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between the attorneys as to the law, or the rule that applies to the measure of damages." Plaintiff had previously requested to give the charge on the subject which he did give. No objection appears to have been made by the defendant to the giving of that charge. This controversy also is controlled by the rule laid down in Steinbauer v. Stone, supra.

6. The court denied defendant's motion that it be allowed the opening and closing of the case to the jury. This is a question of practice. Minnesota Valley R. Co. v. Doran, 17 Minn. 162 (188), holds in so many words that, upon appeal to the district court from an award of railroad condemnation proceedings, the landowner assumes the position as plaintiff and is entitled to open and close. There was, accordingly, no abuse of discretion by the trial court in this regard. See Sartell v. Royal Neighbors of America, 85 Minn. 369, 88 N. W. 985.

7. Finally, the action of the trial court in sustaining objections to certain questions asked is assigned as error. Apart from doubt as to whether any error had been committed, it is clear that no prejudice resulted. As has been previously pointed out, no assignment of error is addressed to excess of the award. The questions were designed to affect the amount of the verdict.

Affirmed.

OLAF OSCAR WESTIN v. ANDREW P. ANDERSON.[1]

January 29, 1909.

Nos. 15,935—(219).

Negligence—Questions for the Jury.

Plaintiff, directed by defendant's foreman to "put in a boom fall" on a derrick, was raised from the ground to the top of the mast by means of a block and pulley. The mast, with the rope and pulley attached to its head, had been standing in the open for two years. On the fifth trip the rope parted. Plaintiff fell and was injured. One of the wooden sides of the pulley was broken. Plaintiff contended that the rope was not kept in the groove of the wheel, but, because of the absence of a part

[1] Reported in 119 N. W. 486.

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of the side, was allowed to run on its edge, and was thereby cut or worn. It is *held* that it was for the jury to determine whether the master was guilty of negligence in failing to exercise due care in furnishing a reasonably safe instrumentality and whether plaintiff was precluded from recovering by his own conduct.

Action in the district court for Hennepin county to recover $21,836.75, damages for personal injuries alleged to have been sustained through defendant's negligence while plaintiff was employed in his stone quarry as a hoisting engineer. The case was tried before Frederick V. Brown, J., and a jury which returned a verdict in favor of plaintiff for $4,124.25. Defendant's motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

Morton Barrows, for appellant.

James A. Peterson and *Paul J. Thompson,* for respondent.

JAGGARD, J.

Plaintiff and respondent, thirty four years of age, was employed by defendant and appellant as a hoisting engineer at defendant's quarry. Defendant's foreman had directed plaintiff "to put in a boom fall" on a derrick, which with the rope and pulley attached to the top of the mast had been standing in the open for about two years. Plaintiff was familiar with the work. The refitting of the derrick required that new guy ropes should be placed on the top of the mast. To accomplish this plaintiff was hoisted to the top of the derrick mast by a rope, to one end of which a pick handle had been tied. This supported plaintiff while four men, standing on the ground and holding the other end of the rope, pulled him to the head of the mast by means of the block or pulley fastened to its top. Plaintiff had ascended the mast four times before the accident occurred. On the fifth trip the rope broke when plaintiff had been raised to a high point. He fell to the ground and suffered the injury for which recovery is sought. This appeal was taken from the trial court's refusal to disturb plaintiff's verdict.

1. The alleged negligence on the part of the defendant was that he failed to exercise due care in furnishing reasonably safe instrumentalities for plaintiff's use; more specifically, that the pulley block through which the rope ran was broken, "so that said rope, instead of going

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in the groove of the sheave or pulley of said block, worked itself on the edge of said sheave, so that the edge of said sheave cut or severed said rope." The block and rope were introduced in evidence. One of the wooden sides of the pulley block had been broken. A part next to the pulley was missing.

The first question is, whether the block was broken prior to the accident. Defendant insists that the record "contains no evidence whatever as to when the pulley block was broken; whether it was broken a month before the accident, a day before the accident, or was broken by being dropped to the ground when it was removed from the mast head on the second day after the accident. * * *" This statement is not sustained by the record. One of defendant's employees testified in substance: "This block was taken down two days after the accident. I saw it. This is the block. It looks exactly just as when it was taken down. The way it looks now. It had this piece broken out. I did not see that piece come off." The block, with its weather-stained edge, where the part had been broken off and with another crack through that entire side of the block, was before the jury. It was clearly justified in finding that the block was in fact broken and defective prior to and at the time of the accident.

The second question is: Was the broken block the proximate cause of the breaking of the rope? Defendant urges that, "while we cannot deny the possibility of the rope having been cut as alleged in the complaint, such a finding must rest on mere conjecture. It cannot be reached as a rational and intelligent conclusion." None the less the jury reached that conclusion. An eminent trial judge submitted the question to it and refused to disturb its verdict. The uncontradicted circumstances fully justified that action.

One of the purposes of the missing side of the block was to cause the rope to go through the groove of the pulley, and to prevent it from working to the edge of the sheave, and thus to secure the rope from being cut by its edge. The jury had before it the original pulley and the rope. The rope, as it appeared on argument in the court, gave the strong impression that it had not been merely broken or snapped, but had been worn or cut. It was explained, however, that much handling since the jury trial had changed its condition. It is obvious that we cannot disturb the jury's finding on this account. It was clearly a

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question of fact whether plaintiff had borne the burden of showing that defendant's negligence was the proximate cause of the injury.

2. The court gave the conventional charge in submitting to the jury whether the plaintiff was precluded from recovery because he had been guilty of contributory negligence or had assumed the risk. The question was plainly for the jury. It is to be borne in mind that defendant had ordered the plaintiff to go to the top of the derrick. There was testimony that the broken part of the block was turned towards the mast and that its defect was not readily observable by the plaintiff when he was being raised by the rope. The wood on the outside of the block, which could have been seen, was sound. The question of assumption of risk, if involved, was on this reasoning for the jury. If assumption of risk was in issue, the charge by the court was as favorable to defendant as it possibly could have been.

The principles of the law of negligence involved are so elementary and the facts involved so peculiar to this case that the discussion of those most nearly relevant authorities would serve no useful purpose.

Affirmed.

STATE v. NEW ENGLAND FURNITURE & CARPET COMPANY.[1]

January 29, 1909.

Nos. 16,011—(49).

Delinquent Personal Tax—Interest.

In the absence of statute so providing, delinquent personal property taxes do not bear interest, either from the date of delinquency or from the date of an order for judgment made in proceedings to enforce payment thereof.

In proceedings in the district court for Hennepin county to collect $2,884.20, delinquent personal property taxes for the year 1904, and the penalty, defendant answered and alleged that the State Board of Equalization for the year 1904 was not a legally constituted board in

[1] Reported in 119 N. W. 427.

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that nine of the members were appointed by the Governor without the advice and consent of the senate as required by law, and that it illegally increased the valuation of defendant's property from $91,200 to $104,180; and offered judgment for $2,508 and alleged tender of that amount to the treasurer of Hennepin county in payment of the tax. The matter was heard before Simpson, J., who made findings and as conclusion of law found the state entitled to judgment in the sum of $2,884.20. From an order, Dickinson, J., granting defendant's motion to reduce the judgment in the sum of $299.96, plaintiff appealed. Affirmed.

E. T. Young, Attorney General, *Al. J. Smith,* County Attorney, and *W. C. Leary,* Assistant County Attorney, for the State.

C. H. Rossman, for respondent.

BROWN, J.

The personal property taxes assessed against defendant for the year 1904 became delinquent March 1, 1905. They were not paid. Due proceedings were thereafter had to enforce payment of the same, in which defendant interposed a defense and objections to a portion of the assessment. A trial of the issues presented by the answer resulted on April 9, 1906, in an order for judgment for the amount of the tax claimed by the state, together with the statutory penalty and costs. Thereafter, on August 9, 1907, the state caused judgment to be entered against defendant in accordance with the order of the court, and included therein, not specially ordered, an item of interest upon the amount of the tax from the date on which the court filed its order for judgment. Defendant subsequently moved to modify the judgment by striking therefrom the item of interest, on the ground that it was not authorized by law. The motion was granted, and the state appealed.

The order must be affirmed. Taxes do not, in the absence of statutes so providing, draw interest, either from the time of assessment or from the time they become delinquent. State v. Baldwin, 62 Minn. 518, 65 N. W. 80; Jaggard, Tax., 346; Sargent v. Tuttle, 67 Conn. 162, 167, 34 Atl. 1028, 32 L. R. A. 822; Trust Co. v. New York, 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260. Our statutes on the subject of taxation do not provide for interest upon delinquent personal prop-

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erty taxes, nor upon real estate taxes, except in the instances mentioned in sections 960 and 961, R. L. 1905. They do not, therefore, bear interest unless imposed by some provision of the statute outside the tax code. Counsel for the state recognize this situation, but contend that interest was properly included in this judgment under section 4344, which provides for interest, in all actions for the recovery of money, from the date of the verdict or order for judgment, at the rate of six per cent. per annum. This statute does not apply to judgments for taxes. A tax remains a tax, whether entered in a judgment or upon the tax rolls, and all rights and liabilities of the taxpayer are fixed and prescribed by the statutes relating to taxation. As we find there no provision for interest, either from the date of delinquency or from the date of an order for judgment entered in proceedings to enforce payment of the tax, the state is not entitled to demand it. If interest upon delinquent real or personal taxes should be imposed, the legislature now in session may so provide.

Order affirmed.

STATE v. H. C. AKELEY LUMBER COMPANY.[1]

January 29, 1909.

Nos. 16,013—(26).

Sales of State Timber—Permits to Cut—Evidence.

Action to recover an alleged balance due to the state from the defendant on account of alleged sales of pine timber to the defendant pursuant to Laws 1895, c. 163. Each of the several permits or contracts, executed by the respective parties to such sales, recited on its face facts showing a compliance with the provisions of the statute as to sales of state timber. *Held:*

1. Such permits, as against the defendant, were prima facie evidence of a valid sale of the timber described therein.

2. Unless the members of the board of timber commissioners, or a majority of them, one of whom is the Governor, officially sign a statement, indorsed upon the appraisal of timber which it is proposed to sell, to the effect that a sale thereof is necessary to protect the state from loss, any attempted sale of such timber and any permit issued for cut-

[1] Reported in 119 N. W. 387.

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ting it are void; but other omissions and irregularities in the sale proceedings are not jurisdictional, and do not render the sale or the permit void.

3. The finding and decision of the trial court to the effect that the timber commissioners in this case did so sign such statement, that the sales and permits are valid, and that the "jack pine" and the "dead and down timber," for which the state seeks to recover the balance of the permit price, were included in such sales and permits, are sustained by the evidence.

Action in the district court for Hennepin county to recover $6,368.67. The facts are stated in the opinion. The case was tried before Brooks, J., who ordered judgment for plaintiff for $3,833.90. From an order denying a motion for a new trial, defendant appealed. Affirmed.

A. Y. Merrill and *R. J. Powell,* for appellant.

All of the contracts set forth in the complaint are void because the state auditor and the timber board, in making the pretended sale, wholly neglected to comply with the requirements of the law necessary to make a valid sale of the timber, and, if the contracts are invalid, the state cannot recover. If the sale was void, the subsequent permit issued under it was void. Since the law of 1895, pine timber is not subject to sale under any circumstances, unless it is liable to waste.

Whenever the question of the sale of any timber is submitted to the board, it is required to determine: (1) Whether such timber is subject to sale under the provisions of section 11, that is, whether the timber is liable to waste. (2) If it is for the best interests of the state that such timber shall be sold; and (3) whether a sale is necessary to protect the state from loss, "and the determination of the board shall be preserved in the records of the meeting, together with the evidence showing that such timber is subject to sale under the provisions of section 11 of this act." That is the evidence showing that the timber is liable to waste. In order to make the permits or contracts sued upon admissible in evidence for any purpose, the state itself must first show that these conditions precedent have been complied with. This proposition is perhaps as well illustrated by cases involving the validity of tax sales as any others. Sanborn v. Cooper, 31 Minn. 307; Bisbee v.

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Torinus, 22 Minn. 555; Negley v. Lindsay, 67 Pa. St. 217; Blum v. Harbin (Tex.) 33 S. W. 153.

If there may be some presumption of the regularity of proceedings of public officers, in cases where the facts necessary to be shown are jurisdictional and the officer has no power to act unless these facts exist, this presumption does not obtain. Philbrook v. Smith, 40 Minn. 100.

It was not only proper but necessary that the state should allege affirmatively that the sale was made pursuant to the provisions of the statute under consideration, and having so alleged, the burden was upon the state to prove these jurisdictional facts before introducing a document, which, unless the jurisdictional facts existed, was wholly void. But if it was not necessary for the state to so plead, it has done so in this case, and having done so, the issue may be raised by answer, and if it is raised the plaintiff is bound to prove it. Dennis v. Johnson, 47 Minn. 56; O'Malley v. St. Paul, M. & M. Ry. Co., 43 Minn. 289.

Some of the statutory requirements may be non-essential. For example—the statement that the estimator was actually on the ground when he made the estimate. But it is certainly essential that this record which is made "the original record of such examinations, estimates and appraisals" should be made by the estimator himself, and that it should be signed and dated by him at the time of such entry. It is certainly essential that the record should show the amount of timber of the size which was evidently fixed by the legislature as a proper size for sale for logging purposes, and the amount and value of all timber below that standard, as well as posts, telegraph poles, ties, and their value. Clearly, the board could not act upon or determine the questions which it is required to determine until the land commissioner had ready to lay before it proper appraisal records. No appraisal could be laid before the timber board until it was properly made up, and no valid publication could be had until a proper appraisal was made.

The land commissioner is required, as secretary of the board, to keep a record thereof, containing the full minutes of each meeting and all the proceedings thereof, while minutes are required to be dated at the time when the meeting occurs, and to be signed by the commis-

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sioners present. The timber board is required to determine at its meeting whether the land is subject to sale under the provisions of section 11 of the act. That is—whether it is liable to waste; whether it is for the best interests of the state that the timber shall be sold; and whether or not a sale is necessary to protect the state from loss. The determination of any one of these questions is not sufficient, and the determination of all questions is required to be preserved in the records of the meeting. There is no such record in existence, as none was ever kept, and there is no competent evidence in this case from which the court can determine that any such meeting was ever held or any such determination ever made by the board of timber commissioners that this timber was liable to waste. The indorsement or statement at the foot of the appraisal records, offered in evidence, "Sale recommended as necessary to protect the state from loss this 10th day of September, 1900," and signed by the Governor and the treasurer, cannot be said to be any record of any such determination. First—because it does not purport to be; and second—because this indorsement is required in addition to the determination of the facts essential to be determined before any sale can be ordered. Unless all these steps are taken by the board of timber commissioners, the land commissioner has absolutely no jurisdiction whatever to make the sale. These records being, each and all of them, essential to the jurisdiction of the officer to make the sale, it would seem to follow, without the specific provision of the statute with reference to the dates, that they must be dated. But when the statute itself requires all of these records to be dated at the time the act is done, it cannot be contended that the date is non-essential. If it is essential, then this whole record falls. An authority almost conclusive upon this proposition is the case of Iverslie v. Spaulding, 32 Wis. 394. See Hiles v. Cate, 75 Wis. 91; Saunderson v. Herman, 95 Wis. 48; Myrick v. Kahle, 120 Wis. 57–62.

There cannot be any estoppel in this case, because one essential element of estoppel, as well as of ratification, is absent, not only from the pleadings, but proof, in this case. It is neither pleaded nor proved that at the time the defendant cut the timber and paid its money it had any notice or knowledge whatever of the fact which rendered the sale or this contract invalid. That such knowledge is necessary in order to

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raise either a ratification or estoppel is established by abundant authority. Kraus v. Thompson, 30 Minn. 64.

Edward T. Young, Attorney General, and *C. S. Jelley, Assistant Attorney General,* for respondent.

START, C. J.

This action was brought in the district court of the county of Hennepin to recover the balance alleged to be due to the state from the defendant on account of several alleged sales to the defendant of pine timber on lands of the state. The complaint alleged four causes of action. The allegations of each were to the effect that on November 14, 1900, the state land commissioner, at public sale held pursuant to Laws 1895, p. 349, c. 163, sold to the defendant the pine timber upon the land described therein at the price specified therein; that the parties duly entered into a written permit or contract for the sale of such timber, and for the entry upon the land by the defendant to cut and remove the timber; and, further, that pursuant to such contract the defendant cut and removed a specified amount of the timber, for which it has not paid the full contract price. Copies of the several permits were attached to the complaint and made a part thereof. Such permits on their face, in form, substance, and recitals, show a compliance with the requirements of the statute as to the sale of timber of the state. The allegations of the answer to each alleged cause of action were to the effect that the permit or contract was void, and, further, that it paid in full the agreed price for all timber cut by it, which was in excess of the actual value thereof.

The cause was tried by the court without a jury, and findings of fact made as to the first cause of action to the effect: That the defendant, pursuant to the first permit, cut and removed from the land therein described 2,074,530 feet of pine lumber, which it paid for at the permit price, $5.30 per thousand feet, except 130,560 feet thereof, known as "jack pine," for which it paid only at the rate of $3.50 per thousand, leaving an unpaid balance of $235. That on May 28, 1900, one Harry McClellan, a state estimator, entered upon the land described in the permit and made an estimate and appraisal of the timber thereon, and thereafter a report of his examination was filed in the office of the land commissioner and pasted in a book kept for that purpose in his

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office, and known as "Land Examiner's Field Book No. 5." That the records of such office do not show when such report was so entered or filed, but all of it is in the handwriting of McClellan. That upon such report there was indorsed a recommendation in these words: "Sale recommended as necessary to protect the state from loss this September 10, 1900"—which was officially signed by each member of the board of timber commissioners. That such appraisal record was signed and sworn to by James McKenzie, but it is not otherwise in his handwriting. That he swore to it before a notary public then employed in the office of the land commissioner, and not otherwise. That it does not appear that McKenzie ever made an estimate or appraisal of the timber, nor that McClellan ever entered such report in the records of estimates and appraisals, except as herein stated, nor that he ever made oath to such report. That, other than as here stated, no estimate or appraisal was ever made and filed in the office of the land commissioner, or record made of any meeting of the board of timber commissioners. That, except as hereinbefore found, no report of any estimator or examiner was ever filed or entered in the office of the land commissioner, or any examination, estimate, or appraisal of the timber in question made, or any record ever made containing any minutes of any meeting of the board of timber commissioners, or any proceedings thereof. That, while it does appear that such board held meetings, it is not otherwise proven, except as may be inferred from the recitals in the permit, that the board ever determined that the timber was subject to sale, or that it was for the best interests of the state that the same should be sold, or whether or not a sale thereof was necessary to protect the said state from loss. That all of the pine timber so cut and removed was sold at said sale by the state to defendant, and was timber which it was authorized to cut and remove in and by its permit, and it was so treated by the defendant, all of which it did by virtue of such sale and permit, and not otherwise. That the defendant purchased the timber, accepted the permit, and cut and removed the timber, and made payment therefor to the extent found, without any knowledge or notice of any irregularity, omission, or defect in any of the proceedings upon which the sale and permit were made and issued, and in the full belief that all the proceedings were in accordance with the statute in such case provided, and that the sale and permit were in all respects valid.

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Substantially similar facts were found as to each of the other causes of action, except as follows:

As to the second cause of action, it was found that the defendant cut and removed from the land described in the permit which is the basis of such cause of action 788,790 feet of timber known as "dead and down," the permit price of which was $7.30 per thousand feet; but the defendant paid only $4.80 per thousand feet therefor, leaving a balance unpaid of $1,971.75.

As to the third cause of action, the finding was that the defendant cut and removed from the land designated in the permit 225,120 feet of timber known as "dead and down," the permit price of which was $7.20 per thousand, for which the defendant paid only $4.70 per thousand, leaving unpaid a balance of $562.80, and, further, that appraiser McKenzie personally entered upon the land described in the permit and made an estimate and appraisal of the timber thereon.

And as to the fourth cause of action it was found that the defendant cut and removed from the land described in its permit 423,740 feet of timber known as "dead and down," the permit price of which was $7.00 per thousand, but the defendant paid therefor only $4.50 per thousand, leaving an unpaid balance of $1,064.35. The trial court, as a conclusion from the facts found, ordered judgment for the state in the sum of $3,833.90, with interest. The defendant appealed from an order denying its motion for a new trial.

It appears from the findings and the undisputed evidence that all of the timber here in question was cut and removed by the defendant from the land described in the several permits, and that all has been paid for at the permit price, except the part thereof designated as "jack pine" or "dead and down"; that the defendant paid for such timber at the respective rates per thousand stated in the trial court's findings, and no more; and, further, that the amount paid for such designated timber was included in drafts drawn on the defendant by the state auditor for payment of the timber cut and removed from the lands described in the permits.

No claim is made that the auditor had any authority to accept a less price than the permit price for any timber covered by the permits or to sell any timber at private sale. It follows, then, that, if the permits were valid and covered all of the timber cut and removed from the

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lands described therein by the defendant, it is liable for the balance of the permit price thereof, which it has not paid.

1. The first contention of the defendant is that the permits were absolutely void, for the reason that the auditor and the timber board, in making the sales upon which they were based, failed to comply with the provisions of the statute relating to such sales; hence this particular action, which is based upon contract, cannot be maintained. If the premises are correct the conclusion would seem to follow. The question is whether the findings of fact and conclusions of law of the trial court to the effect that the sales and permits were valid are sustained by the evidence.

The permits were executed by both parties thereto and were received in evidence. They recited on their face facts showing a compliance with the provisions of the statute as to the sale of state timber. Therefore they were prima facie evidence as against the defendant of a valid sale of the timber therein described. Cassidy v. Smith, 13 Minn. 122 (129); Bruggerman v. True, 25 Minn. 123. Such permits are not, as suggested by the defendant, analogous to instruments relating to tax sales where it is sought to take land for the payment of taxes in proceedings in invitum, for their execution is the act of the parties thereto. The fact that the complaint alleged that the timber was sold pursuant to the provisions of the statute, and that the allegation was denied by the answer, did not change their character as prima facie evidence of the facts therein recited; for the only effect of the denial was to raise an issue as to whether the sales were made pursuant to the provisions of the statute. Dennis v. Johnson, 47 Minn. 56, 49 N. W. 383.

The defendant, however, contends that, if the burden was upon it to show that the sales and permits were void, the evidence establishes their invalidity beyond question. The evidence shows, and the trial court so found, that there were many irregularities and omissions in the proceedings culminating in the sales and the execution of the permits. The extent and character of such irregularities are indicated in the findings to which we have referred. It is quite clear that every failure to comply with the statute relating to sales of state timber is not a jurisdictional defect, which renders a sale, not simply voidable, but absolutely void.

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The statute (section 18) established a board of timber commissioners, consisting of the Governor, auditor, and treasurer of the state, and prescribed the duties of the board in these words: "The Governor and one other member of said commission shall constitute a quorum for the transaction of business. In case the Governor, and at least one other member of said board, shall determine by their votes that any such sale is necessary to protect the state from loss, and before any timber shall be advertised or sold, or any permit issued for entering upon or cutting the timber from any such land, they shall indorse upon the record of each and every estimate of timber so to be advertised and sold, the statement that such sale is necessary to protect the state from loss. Said statement shall be signed by them officially, and the date of such signing affixed thereto, and unless this is done the land commissioner shall have no jurisdiction whatsoever to make such sale." This places upon the board of timber commissioners the responsibility of safeguarding the interests of the state in its timber by requiring the board to determine in each case whether a proposed sale of timber is necessary to protect the state from loss, and to indorse a statement to that effect, signed officially by the members of the board, upon every estimate and appraisal of timber which it is proposed to sell. It is apparent that, unless the members of the board of timber commissioners, or a majority of them, one of whom is the Governor, officially sign a statement, indorsed upon the appraisal and estimate of such timber as it is proposed to sell, to the effect that a sale thereof is necessary to protect the state from loss, any attempted sale of such timber and any permit issued for cutting and removing the timber are void. This court, in construing a similar statute, so held in the case of State v. Shevlin-Carpenter Co., 62 Minn. 99, 64 N. W. 81.

It, however, appears from the record of the case at bar that the members of the board substantially complied with the statute; for they severally and officially signed, stating the date, a statement indorsed upon each estimate and appraisal to the effect that a sale was necessary to protect the state from loss, and that they recommended it for that reason. It is true that there were irregularities in the several appraisals and estimates upon which the statement was indorsed; but neither this nor the fact that no record of the action of the board was shown affects its validity, for the vital fact is the statement of the members of the

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board over their several signatures upon the appraisals and estimates that a sale of the timber is necessary to protect the state from loss.

This brings us to the question whether the irregularities and omissions in the proceedings with reference to the sales were jurisdictional defects, rendering the sales and permits void. The statute answers this question in the negative; for it expressly provides that, unless the statement is so indorsed and officially signed, the land commissioner shall have no jurisdiction whatsoever to make the sale. This necessarily implies that other omissions or irregularities in the sale proceedings are not jurisdictional; otherwise, the express provision as to jurisdiction to make the sale would be wholly unnecessary. From the evidence and findings of fact of the trial court we hold the sales and permits valid.

2. It is further claimed by the defendant that the "dead and down" timber, which is the basis of the second, third, and fourth causes of action, was not included in the permits, for the reason that if the term "pine timber," referred to in the granting clause of the permits, be construed in connection with the other provisions, as it must be, it means growing pine timber and excludes dead and down timber. The very purpose of the statute is to provide for the sale of timber when, and only when, it is liable to waste. It is perfectly obvious that "dead and down" timber would be more liable to waste than growing timber; hence more clearly within the purview of the statute. The permits must not only be construed as a whole, giving effect to all the provisions thereof, but also with reference to the purpose of the statute in authorizing the sale of pine timber. So construing the permits, we hold that the sales were not restricted to white and Norway pine, but that they included jack pine and dead and down timber on the lands therein described as well. The fact that the defendant paid less than the permit price for a portion of the timber cut and removed from the lands, and that the price paid was all that such timber was reasonably worth, is not material; for no one representing the state was authorized to accept less than the permit price, which represented, presumably, the average value of all the timber.

It follows that the findings of the trial court are sustained by the evidence and that its conclusion of law is correct.

Order affirmed.

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J. P. FREEMAN v. CHARLES E. PAULSON.[1]

February 5, 1909.

Nos. 15,677—(11).

Recovery of Contract Price by Vendor.

A vendor of land cannot recover from his vendee by an ordinary action at law the purchase price stated in a written contract.

Vendor May Enforce Specific Performance.

Where parties make a mutual executory contract for the sale of real estate, and the vendor covenants on his part to convey the land, and in consideration thereof the vendee promises to pay the purchase price, and there is nothing in the contract which makes it invalid or objectionable in its nature, nor in the circumstances connected with it, equity regards the vendee as the beneficial owner of the premises, even though he has not paid the purchase price; and the vendor has a right to enforce payment of the purchase money by a suit in equity against the vendee's equitable estate in the land, instead of by an ordinary action at law to recover the debt; and the vendor may proceed to enforce specific performance by such suit, whereby the vendee's equitable estate under the contract is sold in pursuance of a judicial decree, which will operate as an assignment of the vendee's rights under the contract, and whereby it would not operate as a cancellation of the contract itself. Abbott v. Moldestad, 74 Minn. 293, followed and applied.

Discrepancy Between Summons and Complaint—Demurrer.

A demurrer to a complaint on the ground that it fails to state facts sufficient to constitute a cause of action does not reach discrepancies between the relief to which the complaint may entitle and the prayer in the summons.

Action in the district court for Freeborn county to recover $1,200, the unpaid price of land sold upon a written contract. Defendant demurred to the complaint and from an order, Kingsley, J., sustaining the demurrer, plaintiff appealed. Reversed.

John J. Isker, for appellant.

The complaint stating a cause of action, appellant is entitled to relief, either legal or equitable, and the complaint is not demurrable because plaintiff asked for a legal remedy instead of an equitable one. Barkey v. Johnson, 90 Minn. 33; Pomeroy, Rem. & Rem. Rights, § 71.

[1] Reported in 119 N. W. 651.

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The remedy of specific performance is mutual. Hodges v. Kowing, 58 Conn. 12; Whitney v. City, 23 Conn. 624; 2 Dart, Vendors & Purchasers, 1024; Goodwine v. Kelley, 33 Ind. App. 57; 22 Am. & Eng. Enc. (2d Ed.) 947.

H. H. Dunn, for respondent.

Goodwine v. Kelley, 33 Ind. App. 57, squarely holds that an action at law will not lie on an executory contract in writing for the sale of real estate to recover the purchase price. Barkey v. Johnson, 90 Minn. 33, does not sustain appellant's position at all.

JAGGARD, J.

Plaintiff and appellant brought this action to recover the sum of $1,200 and interest upon a written executory contract for the sale of real estate. Defendant and respondent demurred to the complaint upon the ground that the facts stated did not constitute a cause of action. This appeal was taken from the order sustaining that demurrer.

The summons demanded a money judgment, and no other relief is prayed for. It was well pleaded that in May, 1907, plaintiff was the owner of a certain lot in the village of Glenville, and on that day entered into a written agreement whereby he agreed to convey the premises to defendant by warranty deed; that the defendant agreed to pay the sum of $1,200 for the property, $500 of which was to be paid at the time and the balance upon delivery of the deed; that defendant thereupon gave his personal check for the sum of $500, which was afterwards protested; that on October 14, 1907, plaintiff tendered a warranty deed of the premises and demanded of the defendant the sum of $1,200 as the purchase price, but payment was refused; that plaintiff always has been and now is willing to deliver the deed in question to the defendant upon the payment of the purchase price, but that defendant has at all times refused to pay the same.

1. A vendor of land is not entitled to recover the purchase price from his vendee in an ordinary action at law. He can recover only the damages he has sustained by reason of the breach of the contract obligation. 29 Am. & Eng. Enc. (2d Ed.) 719, citing Lathrop v. O'Brien, 44 Minn. 15, 46 N. W. 147, and other cases; 2 Warvelle,

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Vend. (2d Ed.) § 937; 2 Sutherland, Dam. (3d Ed.) § 569; Stewart v. McLaughlin's Estate, 126 Mich. 1, 85 N. W. 266, 87 N. W. 218; Goodwine v. Kelley, 33 Ind. App. 57, 70 N. E. 832. If the complaint be regarded as an action at law merely, the demurrer was properly sustained.

2. Counsel for plaintiff, however, insists that it sets forth a good cause of action for specific performance. That the relief sought was a money judgment is, of course, immaterial. It is elementary that a demurrer will not lie to a mere prayer for relief. The question is whether the facts stated entitle plaintiff to equitable relief. It is also true that here plaintiff has not alleged either the conclusion, or the facts from which a conclusion could be drawn, that he had not an adequate remedy at law. This leads to the consideration of the real merits of the controversy.

Plaintiff's right to prevail depends upon the application to the facts his complaint set forth of the doctrine of mutuality of remedy. The vendee, essentially as a matter of course, is entitled to specific performance. The vendor should be allowed similar relief. It has been demonstrated that "the rule as to mutuality of remedy is obscure in principle and in extent artificial, and difficult to understand and to remember." 1 Harvard L. Rev. 104. In 3 Columbia L. Rev. 1, Dean Ames with characteristic penetration and cleverness has clarified the general subject. While there are authorities to the effect that the specific performance of a contract to sell land will not be enforced, in the absence of a showing for equitable interposition, the general rule, and the rule in this state, however, is that "where parties make a mutual executory contract for the sale of real estate, and the vendor covenants on his part to convey the land, and in consideration thereof the vendee promises to pay the purchase price, and there is nothing in the contract which makes it invalid or objectionable in its nature, nor in the circumstances connected with it, equity regards the vendee as the beneficial owner of the premises, even though he has not paid the purchase price; and the vendor has the right to enforce payment of the purchase money by a suit in equity against the vendee's equitable estate in the land, instead of by an ordinary action at law to recover the debt. And the vendor may proceed to enforce specific performance by such suit, whereby the vendee's equitable

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estate under the contract is sold in pursuance of a judicial decree which will operate as an assignment of the vendee's rights under the contract, and whereby it would not operate as a cancellation of the contract itself." Abbott v. Moldestad, 74 Minn. 293, 77 N. W. 227, 73 Am. St. 348. And see Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87; Pomeroy, Cont. § 6; Waterman, Spec. Perf. § 15. The reason is clear. The vendee is entitled to specific performance, essentially as a matter of course. The remedy should be mutual. In this view the complaint stated a case for specific performance and was not demurrable.

3. It is urged, however, that the summons to which the complaint was attached sought a money judgment. and not other relief. It is elementary that a demurrer lies only on the grounds specified by the statute. R. L. 1905, § 4128, contains nothing which would allow defendant to avail himself of any inconsistency between the summons and the complaint. Moreover, the ground of this particular demurrer is that the facts stated in the complaint do not constitute a cause of action. It follows that defendant cannot avail himself of any discrepancy or irregularity on this point by demurrer.

Reversed.

START, C. J.

I concur with some hesitation. It is evident that the complaint was drafted upon the mistaken theory that upon tendering the deed the plaintiff could recover the purchase price in the action at law. But the complaint alleges, not only a tender of the deed, but a continuing readiness to deliver it. With this allegation, the complaint, very liberally construed, states a case for equitable relief. Upon proof of the allegations of the complaint, so construing them, the court would be justified in ordering a sale of the premises, and a deficiency judgment, or that upon the delivery of the deed into court for the defendant the plaintiff have judgment for $1,200. See complaint in paper book of Abbott v. Moldestad, 74 Minn. 293, 77 N. W. 227, 73 Am. St. 348.

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BOB VUKELIS v. VIRGINIA LUMBER COMPANY.[1]

February 5, 1909.

Nos. 15,776—(260).

Complaint—Demurrer.

As against a general demurrer to a complaint, the question is whether, assuming every fact alleged to be true, enough has been stated to constitute any cause of action whatever.

When Complaint is Sufficient.

A complaint will be deemed sufficient when the necessary allegations may be gathered from all the averments, although the pleading is deficient in logical order and technical language.

Facts Reasonably Implied from Pleading Traversable.

A pleading will be held to state all facts that can be implied from the allegations by reasonable and fair intendment. Facts so implied are traversable in the same manner as though stated directly.

Complaint Good.

A complaint in a personal injury action *held* good as against a general demurrer.

Action in the district court for St. Louis county to recover $15,500 damages for personal injuries. From an order, Dibell, J., overruling its demurrer to the complaint, defendant appealed. Affirmed.

E. C. Kennedy and *H. D. Bailey,* for appellant.

J. De La Motte, for respondent.

ELLIOTT, J.

This is an appeal from an order overruling a general demurrer to a complaint which alleges: That the defendant is and at the time herein mentioned was a corporation engaged in the business of lumbering and getting out logs and timber by rail, and that in its business it owned and operated a railroad, and had cars, engines, tracks, switches, and appliances usually and customarily had, owned, and operated by railroads. That the defendant had and operated in its business near camp 15 what was known as a log loader or jammer, operated by steam and propelled along the rails by its own power, and that the jammer was

[1] Reported in 119 N. W. 509.

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in operation on the line of railroad at the time of the injuries to the plaintiff complained of. That at the time mentioned the plaintiff was earning and capable of earning $40 per month and board. That it was his duty to fasten the hooks upon the chain of said jammer into the chains tied around the logs to be loaded onto the cars, and to change the skids from one car to another after being so loaded. That the manner of doing the work was as follows: The jammer would move forward upon the track to the first car to be loaded, the brakes would be set, then the plaintiff and his partner would place skids at each end of the car to be loaded, and then hook the hook of the jammer chain into the chain which fastened the logs together. The engineer would then start the machinery in motion, and the logs would be loaded onto the car. After the car was loaded with about ten tiers of logs the jammer would then back up, and the plaintiff and his partner would remove the skids from the loaded car and place them against the car to be next loaded, and the operation would be repeated. That it was the duty of the defendant to the plaintiff to furnish him with a safe place to work and with safe and careful servants with whom he was to perform his work, and to warn and instruct him as to the dangers connected with his work, and to give him warnings and instructions, by whistle or bell or otherwise, when about to move the cars or car upon which the jammer was operated, so as to give him an opportunity to get out of the way, and to furnish him with safe and sufficient tools, instruments, and appliances about and with which to perform his said work, and to have and maintain reasonably safe and sufficient rules and a safe and sufficient system to regulate the performance of its said work and business. That notwithstanding its duty in the premises, the defendant failed and neglected to furnish plaintiff with a safe place to work, or with safe and careful servants and employees with whom to do and perform his work, and carelessly and negligently failed and neglected to warn plaintiff when it was about to move its said cars and said jammer car, and failed and neglected to warn and instruct plaintiff as to the dangers connected with his said work, and failed and neglected to have a safe system of rules in the doing of said work, and that by reason of such carelessness and negligence on the part of the defendant as aforesaid the plaintiff has suffered the injuries herein mentioned. That on about July 2, 1907,

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at about nine o'clock in the forenoon of said day, while plaintiff was in the act of removing the skids from the jammer as was usual and customary, the defendant carelessly and negligently, without giving plaintiff any warning that it was about so to do, and while plaintiff was in a position of danger in moving said jammer, the same ran over and upon plaintiff, smashing and bruising the bones, flesh, and muscles of his right foot, so that it became necessary to amputate the first three toes of said foot, causing him to be laid up in the hospital for a period of five weeks, and rendering him unable to do and perform any of the work he was formerly accustomed to do, and made of him a cripple for the balance of his life. Plaintiff's special and general damages are then alleged, and judgment demanded for $15,500.

The appellant urges that this complaint is insufficient, in (1) that it contains no allegations of fact which make the defendant liable, and (2) from the manner of doing the work as described in the complaint it appears that the risks and hazards of operating a railroad did not obtain, and whatever negligence is charged was the negligence of a fellow servant. The first ground of objection resolves itself into the contention that the pleading contains mere conclusions of law, without allegations of fact from which such conclusions can properly be drawn, and particularly in that it does not allege that the plaintiff was at the time in the employ of the defendant. This essential fact is not directly stated; but, in view of the liberal construction which should be given a pleading as against a demurrer, we think that it may be fairly inferred.

When a complaint is met by a demurrer on the ground of insufficiency, the question is whether, assuming every fact alleged to be true, enough has been well stated to constitute any cause of action whatever. The complaint will be deemed sufficient when the necessary allegations can be fairly gathered from all the averments, although the pleading is deficient in logical order and technical language. The pleading will be held to state all facts that can be implied from the allegations by reasonable and fair intendment, and facts so impliedly averred are traversable in the same manner as though directly stated. Sage v. Culver, 147 N. Y. 241–245, 41 N. E. 513; Spottswood v. Herrick, 22 Minn. 548; Farrant v. First Division, St. P. & P. R. Co., 13 Minn. 286 (311); Commrs. of Ramsey Co. v. Brisbin, 17 Minn. 429 (451); King v.

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Nichols & Shepard Co., 53 Minn. 453, 55 N. W. 604. Within this rule the complaint is sufficient.

It is reasonably clear that the complaint states a case of railroad hazard, which makes inapplicable the fellow servant rule; but we are not disposed to enter into a discussion of the question, when presented upon the somewhat vague statements of the pleading.

Order affirmed.

STATE ex rel. EDWARD T. YOUNG v. W. A. HOLGATE.[1]

February 5, 1909.

Nos. 15,805—(23).

Mandamus.

Mandamus is the proper remedy by which to require a county treasurer to pay a draft properly drawn by the state auditor for taxes collected for the state.

Action by State.

When a state institutes suit in its own behalf, it to some extent subjects itself to the same rules which apply to ordinary suitors. If it brings an equitable action, whatever may properly affect the relief demanded may be urged against it. If the action is to recover money, the defendant may plead and prove any claims which are connected with and arise out of the same transactions; but claims and demands arising out of independent transactions are in effect suits against the state, and cannot, without the consent of the state, be asserted as a set-off or counterclaim.

Action against County Treasurer—Set-Off.

In mandamus proceedings by the state against a county treasurer to compel the payment to the state of the proceeds of taxes collected and in the possession of the county treasurer, the defendant cannot plead by way of set-off or counterclaim that other money formerly collected by the treasurer had been lost through the failure of certain banks in which the money had been deposited, and that notwithstanding such loss the amount had been paid to the state by the treasurer in the expectation that the loss would be made good by the banks and bondsmen. The matter sought to be asserted did not arise out of the same transaction and had no connection with the matter referred to in the mandamus proceedings.

[1] Reported in 119 N. W. 792.

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On the relation of the attorney general, the state instituted mandamus proceedings in the district court for St. Louis county to compel the treasurer of that county to pay the state the unpaid balance of $117,070.54, part of the proceeds of certain tax collections of the year 1899. The answer set up that the unpaid balance was that portion of the funds of the county belonging to the state wholly lost by the suspension, failure and bankruptcy of certain banks duly designated as depositories of public funds under the statutes. The terms of office of the attorney general and of the county treasurer having expired, their respective successors were substituted as parties to the litigation. The case was submitted to Cant and Dibell, JJ., who found for the state and ordered that a writ of mandamus issue commanding the county treasurer to pay $17,157.54 to the state treasurer. From a judgment entered pursuant to the order, defendant appealed. Affirmed.

John H. Norton, County Attorney, and *William J. Stevenson,* for appellant.

Edward T. Young, Attorney General, and *C. S. Jelley,* Assistant Attorney General, for the State.

ELLIOTT, J.

The state, on the relation of the attorney general, commenced mandamus proceedings to compel the treasurer of St. Louis county to pay to the state the proceeds of certain tax collections. The appeal is from a judgment in favor of the state.

At the time of the regular quarterly settlement in August, 1899, St. Louis county had on hand moneys collected for the state since the last previous settlement in the sum of $117,070.54. On August 31, 1899, the state auditor drew a draft on the county treasurer for said sum. The treasurer paid the amount of this draft, less the sum of $17,154.74, which sum he refused to pay because moneys theretofore collected for the state between 1890 and 1899, exceeding the said sum of $17,157.74, had been lost through the failures of the regularly designated county depositories, but which, notwithstanding such loss, had been paid by the county to the state in the expectation that the loss would be made good by the depositories and their bondsmen. He claimed the right to set off the amount of the lost moneys against the moneys

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due on the quarterly settlement. In this proceeding it was sought to compel the county treasurer to pay said sum of $17,157.74 to the state.

1. Mandamus is the proper remedy by which to compel the performance of an act which the law enjoins as a duty resulting from an office (State v. Ames, 31 Minn. 440, 18 N. W. 277; Mechem, Offices & Officers, § 964), and it will lie against a county treasurer to require him to pay warrants properly drawn for the payment of debts and dividends against the county (State v. Staley, 38 Oh. St. 259). This draft was properly drawn, and the proceedings were properly instituted, and were not affected by the change of treasurers. "It is no objection to the issuing of a mandamus against a public officer that the respondent's predecessor in office, and not the respondent, was the one who failed in the performance of the duty complained of." 13 Enc. Pl. & Pr. 663; People v. McConnell, 146 Ill. 532, 34 N. E. 945; People v. Comptroller, 77 N. Y. 45; In re Parker, 131 U. S. 221, 9 Sup. Ct. 708, 33 L. Ed. 123.

2. We cannot in this proceeding determine whether the loss of the money must fall upon the state or the county. The state cannot be sued without its own consent, and the assertion of this claim as a set-off or counterclaim is in effect a suit against the state. When the state institutes a suit in its own behalf, it to a certain extent subjects itself to the same rules which apply to ordinary suitors in its courts. When it institutes an equitable action, whatever may properly affect the relief demanded may be urged against it, and in an action brought by it to recover money the defendant may in defense assert any claims which are connected with and arise out of the same transaction; that is, in such an action the defendant is "entitled to plead and prove any and all matters properly defensive, including credits and set-offs, so far as the latter are dependent on, connected with or grow out of the transaction which constituted the subject matter of the suit." As said in Port Royal & A. Y. Ry. Co. v. State, (C. C.) 60 Fed. 552: "Of course, she is only bound quoad the matter submitted by her in her suit." Moore v. Tate, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. 712; Com. v. Todd, 72 Ky. 708; Com. v. Owensboro, 81 Ky. 572; State v. Portsmouth, 106 Ind. 435, 7 N. E. 379. But all claims and demands arising out of independent transactions are considered as suits against the state. Auditor v. Board, 106 Mich. 662, 64 N. W.

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570; Aplin v. Board, 73 Mich. 182, 41 N. W. 223, 16 Am. St. 576; Aplin v. Board, 74 Mich. 536, 42 N. W. 143; Raymond v. State, 54 Miss. 562, 28 Am. 382; State v. Baltimore, 34 Md. 344; Battle v. Thompson, 65 N. C. 406; People v. Corner, 59 Hun, 299, 12 N. Y. Supp. 936, affirmed 128 N. Y. 640, 29 N. E. 147; Chevallier v. State, 10 Tex. 315; Com. v. Matlack, 4 Dall. (Pa.) 303, 1 L. Ed. 843; Treasurers v. Cleary, 3 Rich. Law (S. C.) 372; People v. Miles, 56 Cal. 401.

The claim which the county is seeking to assert against the state in this proceeding did not arise out of, and is in no way connected with, the claim made by the state against the county. The matters have no relation to each other. The state's right to the taxes which have been collected, is conceded, and it has, by bringing this action, not consented to submit any other controversy to litigation.

The writ was properly issued, and the judgment is affirmed.

VICTOR L. JACOBSON v. MERRILL & RING MILL COMPANY.[1]

February 5, 1909.

Nos. 15,837—(145).

Injury to Infant Servant.

A boy under fifteen years of age was employed in violation of section 1804, R. L. 1905, and placed at work in a sawmill in the vicinity of dangerous machinery, which was not properly protected as required by section 1813, R. L. 1905. His work consisted of gathering lath from a table, collecting them in bundles, and placing them on the table or cradle of a nearby lath machine. When this cradle was released by a trip that came up through the floor about an inch, it could be moved forward against two saws, and the lath cut into uniform lengths. The boy, becoming tired, sat down on this cradle. Certain waste pieces of lath and damp sawdust had been allowed to accumulate on the floor near the trip. In attempting to rise, the cradle was in some way pushed forward, and the boy's arm brought in contact with the saw. *Held:*

1. That the employment of the boy and the failure to properly cover

[1] Reported in 119 N. W. 510.

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the machinery, in violation of the statute, made a prima facie case of negligence on the part of the employer.

Resting Was Within Scope of Employment.

2. In sitting down to rest for a short time, the boy did not depart from the scope of his employment.

Questions for Jury.

3. The questions of contributory negligence and assumption of risk were for the jury to determine.

Action in the district court for St. Louis county by the guardian ad litem of plaintiff to recover $10,000 damages for personal injuries sustained by plaintiff while in defendant's employ. The case was tried before Cant, J., and a jury which returned a verdict in favor of plaintiff for $1,500. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

Howard T. Abbott, for appellant.

H. W. Lanners and *Davis & Hollister,* for respondent.

ELLIOTT, J.

The action was for damages sustained by Victor L. Jacobson on April 19, 1906, while in the employ of the Merrill & Ring Mill Company. The appeal is from the judgment entered therein after the denial of the defendant's motion for judgment in its favor notwithstanding the verdict. At the time of the accident Jacobson was fourteen years and nine months old, and had been employed by the mill company without a permit from the school superintendent, as required by section 1809, R. L. 1905. His place of work was in the sawmill, where saws, shafts, pulleys, belt conveyors, and other machinery driven by steam were operated.

Jacobson was employed and put to work sorting lath which came down a sixteen-foot slide from a room overhead onto a table, from which they were gathered up, separated, and done up in bundles of fifty and then placed in a rack or kind of cradle, which formed a part of a machine which stood from seven to ten feet from the sorting table. The lath machine was operated by another boy. The cradle on which the bundles were placed was composed of two upright planks, the top ends of which were hollowed out into semicircles. The bundles of lath were laid in these hollows, and the cradle was

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so constructed that it could then be pushed or tipped forward, so as to bring each end of the bundle against a revolving saw, and thus cut the lath to a uniform length of thirty two inches. When not in use the saws continued to revolve, but appear to some extent to have been covered by the boards which formed the sides of the cradle or "buck." This buck was released by a trip which came up through the floor about an inch, and about which more or less rubbish had accumulated.

The plaintiff alleged that the defendant was negligent (a) in employing a boy under sixteen years of age, in violation of section 1804, R. L. 1905, and (b) in failing to properly guard dangerous machinery, as required by sections 1813–1815, R. L. 1905. Upon the facts disclosed by the record the appellant was guilty of violating both of these statutes, and a case of negligence was thereby made against it which rendered it liable for any damages sustained by the boy, while in the course of his employment, of which such negligence was the proximate cause, unless he is precluded from recovering because of his own contributing negligence or having assumed the risk. Perry v. Tozer, 90 Minn. 431, 97 N. W. 137, 101 Am. St. 416; Bromberg v. Evans, 134 Iowa, 38, 111 N. W. 417; Fitzgerald v. International F. T. Co., 104 Minn. 138, 116 N. W. 475.

The appellant contends that the respondent, when injured, was doing nothing for his employer, that he was not doing what he was hired and told to do, that he was doing something that he knew he ought not to do, and that the statute applies only when the boy is injured by the failure to properly guard the machine at which he is required to work. While working in the mill the respondent was engaged in a dangerous occupation within the meaning of the statute. Perry v. Tozer, supra; Fitzgerald v. International F. T. Co., supra. Of course, this machine was not designed or intended to be used by employees as a place of rest; but a careful man who employs small boys might reasonably anticipate that they might make such use of anything that was at hand. We think it was something which might have been apprehended and provided against. Lane v. Atlantic, 111 Mass. 136; Hill v. Winsor, 118 Mass. 251; Marsh v. Great Northern, 101 Me. 489–502, 64 Atl. 844. Having failed to properly guard the machinery, the appellant was liable for the resulting damages, although it could not have reasonably anticipated that any one would be injured in the exact way in

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which it actually occurred. McGinty v. Waterman, 93 Minn. 242, 101 N. W. 300; Christianson v. Northwestern C. B. Co., 83 Minn. 25, 85 N. W. 826, 85 Am. St. 440; Christianson v. Chicago, St. P., M. & O. Ry. Co., 67 Minn. 94, 69 N. W. 640.

A serious question in this case is whether the respondent was injured while in the course of his employment. Before there can be a recovery it must appear that the boy was at the time of the accident engaged in and about the work for which he had been employed, and not in something entirely foreign to it. He was employed and put to the work of counting and gathering up the lath from the table and placing the bundles on the lath machine cradle. He worked about the lath machine, as well as the table, for he had to deposit the bundles on the lath machine. He had been at work for four days. On the afternoon in question he had been rushed by the work, and, becoming tired, stepped over to the lath machine and sat down on the cross-bar of the buck to rest. In rising he slipped, and in some manner threw his arm against the saw. He does not give a very clear statement of what happened after he sat down; but the jury might well have believed that he was safe until the buck released and swung forward. There was ample evidence to show that the buck was not properly locked.

The questions of contributory negligence and assumption of risk were properly submitted to the jury. Manifestly the boy did not assume the risk. He had never been told not to sit on any part of the machinery, and on his own story he had inadequate knowledge of the dangers and conditions. The act of negligence charged is in sitting on the lath buck when he might have gone to some other place. But, unless he climbed onto the table where the lath was accumulating, there was no other place where he could sit down without going from fifteen to twenty feet away from his work, and there he could not have kept an eye on his work. Under such circumstances the boy, when he sat down to rest, was exercising the reasonable privilege of an employee, and in doing so he did not depart from the scope of his employment. He was not absent from his place of work, but was at the time engaged in the line of his duties and within the scope of his employment. These questions were at least for the jury to determine.

It is not claimed that he did anything to cause the cradle to move forward, unless it was by slipping on the wet refuse on the floor and

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falling against or stepping on the trip. When drawn forward the boards to some extent protected him from the saw, so that it is probable that in slipping his foot released the trip, and thus caused the cradle to swing and his arm to strike the saw. This is a fair inference from the evidence. So long as the trip was not thrown, he might sit on the cross-bar of the cradle with comparative safety. It was not a wise thing to do; but when we take into consideration the age of the boy, the lack of adequate instructions, the fact that the saws were partially covered by the boards when the cradle was drawn forward and properly fastened, and that it had to be released by touching a trip, which came up through the floor about an inch, the accumulation of rubbish on the floor about the trip, and other circumstances which need not be stated, it is clear that the question of contributory negligence was for the jury.

Judgment affirmed.

JAGGARD, J. (dissenting).

The facts in this case have produced the conviction in my mind that the minor in this case was not injured while in the course of his employment. Therefore the order appealed from should have been reversed.

KARL F. BICK v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.[1]

February 5, 1909.

Nos. 15,844—(171).

Submission of Case Upon the Evidence.

Where the pleadings present clearly defined issues, and other issues are not tried by consent, it is error for the court, against the objection of the defendant, to submit the case to the jury upon the evidence, instead of the pleadings.

Action in the district court for Clay county to recover $1,750, damages caused by failure to deliver promptly goods shipped by plaintiff

[1] Reported in 119 N. W. 505.

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over defendant's railroad. The allegations of the amended answer are stated in the sixth paragraph of the opinion. The case was tried before Taylor, J., and a jury which returned a verdict in favor of plaintiff for $1,453.73. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed and new trial granted.

A. H. Bright and *Ball, Watson, Young & Lawrence,* for appellant.

F. H. Peterson, for respondent.

ELLIOTT, J.

Plaintiff recovered a verdict against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, and the defendant appealed to this court from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

There is very little conflict as to the facts, other than the amount of damages; but the manner in which the case was tried makes it somewhat difficult to ascertain the issues and theories of the respective parties. It appears that on or about May 15, 1903, a party by the name of Gantz delivered a carload of vinegar and wine to the Union Pacific Railway Company at Tonganoxie, Kansas, for shipment under the terms of a certain bill of lading to the respondent, Bick, at Tenny, Minnesota. The Union Pacific Company carried the property from Tonganoxie to Leavenworth, Kansas, and delivered it to the Chicago Great Western Railway Company, by which it was carried to the Minnesota Transfer and on May 9 delivered to the appellant for carriage to Tenney, in Wilkin county, Minnesota. It arrived at that station on May 21, 1903, and the station agent was unable to find the consignee. The usual methods were pursued; but it was not until after June 15 that the appellant learned that a mistake had been made in sending the car to its station, and that it was intended for another station of the same name located on the Northern Pacific Railway in Clay county, Minnesota.

The appellant was not responsible for the mistake. Upon being directed to do so, it sent the car on to Glenwood, Minnesota, under instructions to deliver it there to the Northern Pacific Company for carriage to the consignee at Tenny, on its line. When the car reached Glenwood, it was in the usual course of business placed on the trans-

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fer tracks of the Northern Pacific Company. It seems that it is customary for each connecting carrier, when it receives a car, to pay or become responsible for the freight earned by the line from which the car was received. The Northern Pacific agent at Glenwood examined the property in this car, and, being of the opinion that it was not of sufficient value to secure the amount for which they would become responsible to the appellant for freight, declined to receive it. The result was that the car stood on the track at Glenwood for more than a month, and until Bick paid the amount of the freight to the Northern Pacific Company. When finally delivered to the consignee the wines and vinegar had spoiled and, according to the finding of the jury, become worthless.

Bick thereafter brought an action against the Northern Pacific Company in which he sought to recover upon two causes of action. The first alleged the shipment from Tonganoxie and facts which it was claimed entitled him to recover damages from the Northern Pacific Company. The second alleged that he had paid freight to the Northern Pacific upon a false statement made by its agent that the goods were then in good condition. The trial of that action resulted in a directed verdict for the railway company upon the first, and a verdict in favor of the plaintiff upon the second, cause of action.

Thereafter Bick commenced this action against the appellant to recover the damages caused by the deterioration of the property, alleging that it was caused by the negligent manner in which the appellant handled and cared for the car and its contents. In the complaint he alleged that on or about the first day of July, 1903, he entered into a contract with the defendant whereby it agreed to carry the goods from Tenney to Glenwood and deliver them to the Northern Pacific Company; that, in violation of the terms of the agreement to carry the goods with care and dispatch, it delayed the delivery thereof for forty five days, during which time it negligently allowed the goods to be exposed to the heat and to spoil, to his damage in the sum of $1,750. It will be observed that the plaintiff thus pleaded an independent contract for the transportation of the goods from Tenney to Glenwood.

The answer as amended admitted that Bick was the owner of the goods loaded on the car at Tenney, denied all the other allegations of the complaint, and alleged that the goods were delivered to the Union

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Pacific Railway Company at Tonganoxie, Kansas, to be shipped to Bick at Tenny in Clay county, Minnesota, by way of the Chicago Great Western Railway Company and the Northern Pacific Railway Company, that it was delivered to the defendant at the Minnesota Transfer by mistake, and was by it carried to a station on its own line of the same name. It denied that the transportation from Tenney to Glenwood was an independent and original shipment, and alleged that it was made under the terms and conditions of the bill of lading issued by the Union Pacific Railway Company at Tonganoxie, Kansas, that the plaintiff had violated the terms and conditions of that contract and was not entitled to recover damages, and that the defendant was entitled to the benefit of the terms of that bill of lading and could assert the violation thereof as a defense. The reply denied each and every allegation contained in the amended answer.

When the case came on for trial the parties stipulated that the evidence which had been offered in the action brought against the Northern Pacific Railway Company might be used in this action, and the court ruled that the evidence there received should be received as the record stood, without the right to interpose additional objections to any particular parts thereof. The plaintiff then showed the condition of the goods and the manner in which the car was loaded at Tonganoxie, and introduced the bill of lading in evidence. The appellant's agent at Glenwood testified that the car containing the property in question arrived at Glenwood from Tenney on June 20, 1903; that it was placed on the Northern Pacific Company's transfer track on the following morning; that on account of the freight charges the Northern Pacific Company refused to accept it; and that it remained there until August 5. In the meantime the railway officials were corresponding and investigating the matter. The Northern Pacific Company could have taken the car at any time by paying or becoming responsible for the accumulated charges, which they refused to do because the goods were in bad condition. The complaint, a portion of the judge's charge, and the judgment in the case against the Northern Pacific Company were also introduced in evidence, and this, with evidence as to the amount of the damages, practically constituted the plaintiff's case.

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The defendant, after offering in evidence certain telegrams, rested and moved for a directed verdict, "upon the complaint and all the evidence," because the plaintiff had not established a right to recover. This motion was denied. The trial judge then stated that he would submit the case to the jury on the evidence, and not on the allegations in the pleadings. On the theory that the defendant was a connecting carrier on the route from Tonganoxie to Tenny, Clay county, he charged that, if the goods were shown by the plaintiff to have been in good condition when delivered to the Union Pacific Company at Tonganoxie and in bad condition when delivered to the Northern Pacific Company at Glenwood, the burden was upon the defendant to prove that the goods were in bad condition when received by it, and that the damage did not result from any lack of proper care while the goods were in its possession. Nothing was said about the breach of any of the conditions of the bill of lading, as no evidence had been offered upon these issues presented by the answer. After the verdict was returned, the plaintiff moved for leave to amend the complaint so as to make it conform to the evidence. This motion was granted; but the complaint never was in fact amended, unless it was by the legal effect of the granting of the motion.

The appellant now assigns errors upon the refusal of the court to grant the motion to direct a verdict in its favor, the refusal to give certain requests for instructions, and the giving of certain instructions in the general charge of the court.

The theory of the respondent is that the parties by consent departed from the issues made by the pleadings and tried the case upon the evidence. It is true that, if parties voluntarily litigate issues other than those presented by the pleadings, the question of variance cannot thereafter be raised. But we do not think that this is a case which is governed by that rule. The issues which were presented by the complaint were clearly defined. Its allegations were denied in the answer, which also narrated the previous history of the property, evidently for the purpose of enabling the defendant to avail itself of defenses which it thought arose under the bill of lading issued by the Union Pacific Company. The plaintiff did not consent to the shifting of the issue, as the reply denied all the allegations of the answer. The evidence, which it was stipulated might be invoked from the record of the

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Northern Pacific case, had been offered under different pleadings and in a case which had been tried upon a theory very different from that presented by the complaint in this action. The stipulation, therefore, meant that the evidence from the former case might be received in this action so far as material to the issues. When the case was closed, the defendant had offered no evidence on any issue which would suggest a departure from the theory upon which the complaint had been framed. We search the record in vain for anything to suggest that the defendant had consented to the trial of any issues not tendered by the complaint. Unless the plaintiff had established the cause of action pleaded by him, the motion for a directed verdict should have been granted. The complaint had not then been amended, and there was no suggestion of an amendment until after the verdict was rendered. We are unable to see where the court found any authority for declining to submit the case to the jury upon the issues upon which the plaintiff had come into court.

This manner of submitting the case was prejudicial to the defendant, because it practically eliminated the real issue and prevented the jury from considering the question whether the defendant had carefully and properly carried the goods from Tenney and delivered or offered to deliver them to the Northern Pacific Company at Glenwood. The car arrived at the defendant's station of Tenney on June 20, and under the pleadings the jury should have been instructed as requested—that the plaintiff could recover only for damges occasioned after that date and before delivery to the Northern Pacific Company. It is perfectly clear from the evidence that the injury to the goods occurred after they had reached Glenwood, and while the car was standing on the transfer track awaiting the action of the Northern Pacific Company. We find no evidence that the defendant company made any specific demand upon the Northern Pacific Company for the actual payment of the freight charges before the goods would be delivered. The acceptance of the goods by the Northern Pacific Company would have rendered it liable to the delivering carrier for its accumulated freight charges, and, recognizing that such would be the effect, it refused to accept the car. It was thus left in the possession of the defendant.

The question, then, was whether the defendant was guilty of negligence in the care of the goods thus left on its hands. The Northern

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Pacific Company was not as a matter of law obliged to accept the goods and assume prior charges. The defendant may not have been required to deliver the car to the Northern Pacific Company until its charges were paid or assumed. The Northern Pacific Company having refused to accept the car, what, then, under the circumstances, was the duty of the defendant? Did it remain liable as carrier? What obligation with reference to the care of the property did it assume? Did it make proper provision for its conservation and protection? See Southard v. Minneapolis, St. P. & Sault Ste. Marie Ry. Co., 60 Minn. 382, 62 N. W. 442, 619; Buston v. Pennsylvania Ry. Co., 119 Fed. 808, 56 C. C. A. 320; 1 Hutchinson, Carriers (3d Ed.) § 103a; 6 Cyc. 483. These questions were not determined.

It is not necessary to consider the various assignments of error. They are mostly directed to specific instructions, which were erroneous because the trial court was proceeding upon an erroneous theory of the case.

Although the motion to direct a verdict in favor of the defendant should have been granted when made, for the reasons already stated, yet we do not consider it a case where judgment should have been entered for the defendant notwithstanding the verdict. The pleadings may be recast, or the case tried upon the issues presented by the pleadings as they now stand, as the parties are advised.

The order denying the defendant's motion for a new trial is therefore reversed, and a new trial granted.

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WILCOX CANADIAN LAND COMPANY v. STEWART & MATTHEWS COMPANY.[1]

February 5, 1909.

Nos. 15,861—(151).

Land Contract Construed.

A certain contract for the sale and purchase of land construed, and *held* not so uncertain in its terms as to be void and unenforceable.

Action in the district court for Ramsey county to recover $60,000 for the breach of an agreement. From an order, Bunn, J., overruling defendant's demurrer to the complaint, it appealed. Affirmed.

C. E. Hamilton and *J. W. Pinch,* for appellant.

Morphy, Ewing & Bradford, for respondent.

ELLIOTT, J.

The Wilcox Canadian Land Company, being the owner of certain land in the province of Saskatchewan, Canada, entered into a contract with the Stewart & Matthews Company whereby the latter was given the right to sell the land upon terms and conditions therein stated. The Stewart Company also agreed, upon demand by the Wilcox Company, to purchase the land which remained unsold on a specified date, and upon its refusal to do so this action was brought to recover damages for the breach of the contract. The defendant demurred to the complaint, and this appeal is from an order overruling the demurrer.

The complaint alleges the making of the contract, which provided that the Wilcox Company agreed to list the lands with the Stewart Company, and that the latter agreed to sell all the land on the terms set out within thirteen months from October 1, 1906. At that time its right to make sales terminated; but, if any land then remained unsold, the Stewart Company agreed to purchase it at $14 an acre if the Wilcox Company elected to require it to do so. It was optional with the Wilcox Company "to cancel this contract if all of said land is not sold at the times herein provided, or may exact the fulfilment of the contract of the purchase above provided for. It being entirely optional

[1] Reported in 119 N. W. 504.

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with it as to either course to pursue in this respect." All sales were to be made by the Stewart Company at a price to net the Wilcox Company a minimum price of $13 an acre and one-half of any sum over $15 per acre in addition to the minimum price. The difference between $13 and $15 per acre and one-half of any excess over $15 per acre was to be the commission or compensation of the Stewart Company.

Certain other provisions were made for dividing commissions and profits. Before any sale was to be made, the Stewart Company was to make out a complete table of prices and submit it to the Wilcox Company for approval, fixing the price of the land by quarter sections. It was also provided that "no contracts of sale shall be made that cannot be forfeited on thirty days' notice by mail," and "no contract of sale shall be complete until signed" by the Wilcox Company. It was alleged that this contract was entered into; that the table of prices was submitted by the defendant to the plaintiff, and was approved and agreed upon in October 1906; that defendant failed to sell all of the lands by November 1, 1907; that plaintiff elected to require defendant to fulfil its agreement to purchase the remaining lands at $14 per acre; that demand therefor was made on the defendant, which refused to purchase; that the plaintiff was willing and ready to sell; that the land was not worth to exceed $9 per acre on and after November 1, 1907; and that plaintiff has been damaged by reason of the defendant's refusal to purchase in the sum of $60,000, for which sum judgment was demanded.

It is contended that the demurrer should have been sustained because (1) the agreement to purchase was without consideration; (2) the contract is void for uncertainty; and (3) that an action for damages cannot be maintained, as the only remedy in the event of a breach of the contract by the defendant is to cancel the contract or sue for the purchase price.

The demurrer was properly overruled. There is no substance in the appellants' arguments. The Wilcox Company reserved the right to cancel the contract or require the Stewart Company to purchase the lands which were unsold at the end of the thirteen months period during which the contract was to be in force. The various provisions of the contract were dependent, and furnish ample consideration for the

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particular provision which the Wilcox Company is now seeking to enforce. The Stewart Company stood to win the commissions on sales made, and the Wilcox Company could not legally have refused to approve sales which conformed to the contract.

The provision that no contract could be made that could not be forfeited on thirty days' notice meant forfeited for cause, and not arbitrarily. The contract was not so uncertain and ambiguous as to render it void.

The provision in the contract which reserves to the Wilcox Company the option to cancel the contract or insist upon the purchase of the remaining lands by the Stewart Company is not a determination of the remedy which shall be pursued in the event of the Stewart Company refusing to purchase the land, and the rule applied in Rowell v. Oleson, 32 Minn. 288, 20 N. W. 227, Avery Planter Co. v. Peck, 86 Minn. 40, 89 N. W. 1123, Id., 80 Minn. 519, 83 N. W. 455, 1083, and other cases, has no application.

Order affirmed.

OLE H. JOHNSON v. COUNTY OF MORRISON and Others.[1]

February 5, 1909.

Nos. 15,876—(111).

Order Establishing County Ditch.

The order required by section 10, c. 230, Laws 1905, establishing a ditch, must in itself, or by reference to the engineer's report, which is itself sufficient, definitely locate the ditch, by giving the proper starting point, route, and terminus. The order under consideration in this case *held* insufficient.

Action in the district court for Morrison county to restrain defendants from maintaining a certain ditch and from overflowing plaintiff's land and to declare the ditch a nuisance and to require defendants to fill in the ditch, and for $400 damages. The case was tried before Taylor,

[1] Reported in 119 N. W. 502.

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J., who made findings and as conclusions of law found that plaintiff was entitled to judgment enjoining defendants from maintaining the ditch, and requiring defendants to abate the same and prevent any greater flow of water upon plaintiff's land than would flow upon such land had the place where the ditch was constructed remained in its natural condition. From an order denying a motion for judgment notwithstanding the order and findings or for a new trial, defendants appealed. Affirmed.

F. W. Lyon and *D. M. Cameron,* for appellants.

E. A. Kling and *A. P. Blanchard,* for respondent.

ELLIOTT, J.

On April 17, 1905, a petition for the construction of a ditch lying wholly in Morrison county, Minnesota, was filed in the office of the county auditor of that county. An engineer was appointed, his report and that of viewers made, and notice given that the matter would be heard before the county commissioners on October 16, 1905. The ditch was established, contracts for its construction entered into, and the work completed in November 1906. The respondent owns land six or seven miles from the place where the ditch enters Little Elk river. On August 24, 1906, a heavy rain caused the water to rise in the ditch and river and overflow the land.

The order of the trial court must be affirmed, notwithstanding the provision of the drainage law that the act shall be liberally construed, so as to promote the purposes for which the statute was enacted. This ditch was never legally established, because the description in the proceedings was so indefinite and uncertain that the ditch could not be accurately located. The contractor constructed a ditch somewhere in the vicinity of the engineer's survey; but it does not follow that the ditch was constructed where the county commissioners intended to locate it. The petition in such a proceeding must set forth the necessity for such a ditch, that it will be for the public benefit and promote the public health and contain "a description of the proposed starting points, routes and termini." A petition in proper form, filed as required by the statute, is a jurisdictional prerequisite to the authority of the county commissioners to entertain a proceeding thereunder; but the description of the proposed ditch need not be stated

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with perfect accuracy. If the starting point, route, and terminus are stated with approximate accuracy, it is sufficient for jurisdictional purposes. State v. Board of Co. Commrs. of Polk County, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161; State v. Lindig, 96 Minn. 419, 421, 105 N. W. 186. The description in this petition was therefore sufficient. In the notice of hearing before the commissioners the beginnings and endings of the proposed ditch were given as "at or near" certain points. This notice is also jurisdictional. Curran v. County of Sibley, 47 Minn. 313, 50 N. W. 237. But we will assume that it was sufficient.

But the order describing the ditch must, either in itself or by reference to the engineer's report, definitely describe it. State v. Lindig, supra; Sonnek v. Town of Minnesota Lake, 50 Minn. 558, 52 N. W. 961. The statute (Laws 1905, p. 310, c. 230, § 5) provided that the engineer "shall make a detailed and complete report of his doings, and submit therewith the necessary plans and specifications and a description of the lands over which the ditch or ditches is or are surveyed." Section 10 requires that the commissioners, after the hearing, "shall by an order containing such findings establish such ditch as specified in the report of the civil engineer, and establish and confirm the viewers' report." The order in question, after reciting that the report of the engineer had been made and filed, stated that: "Being satisfied that the proposed ditch will be of public utility and conducive to public health and public benefit and convenience, do hereby locate and establish the said ditch according to the report and the specifications of said civil engineer made and filed herein."

The engineer's report contained no description, unless by reference to a plat or diagram. The report shows that the engineer made a survey of the line of the proposed ditch and set stakes one hundred feet apart along the line. A plat, which was filed in the auditor's office, but not attached to the report, was intended presumably to show the location of the ditch. It contains lines and numbers which were evidently intended to represent sections. There was also another plat showing a profile of the ditch.

It is claimed that the report, together with these plats, sufficiently show the location of the ditch. The correctness of this claim must be determined from an inspection of the plats, which are too complicated

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to be discussed in detail. It is possible that the plats, in connection with the stakes on the ground, would enable an engineer to find the line of the proposed ditch; but the statute contemplates that the location must be definitely fixed in the order or report to which reference is made. It must be complete in itself and the location made definite. In this case the location of the ditch might have been completely changed by some trespasser shifting the stakes after they were placed by the engineer and before the order establishing the ditch was made. It is not much more definite than the traditional description that began at a blackbird on a limb and ran southeast to a red cow in the pasture. Our examination of the record satisfies us that the trial court was correct in the statement that "the report of the engineer gives no description or location whatever. All that is given is a plat, upon which the ditch is delineated and which shows certain section and quarter section lines. The starting point of the ditch is not upon any of these lines, and no measurements or bearings are given, showing its distance or direction from any known point. The ditch does not follow any known lines, and no courses or distances are given. * * * The terminus of the ditch is at the Little Elk, but not at any known point, and no measurements or bearings are given showing its distance or direction from any known point."

The order establishing the ditch was therefore void, and its maintenance was properly enjoined. The principle is that applied in Chadbourne v. Zilsdorf, 34 Minn. 43, 24 N. W. 308.

Order affirmed.

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NESTOR RAITILA v. CONSUMERS ORE COMPANY.[1]

February 5, 1909.

Nos. 15,910—(209).

Negligence of Vice Principal.

In an action to recover damages alleged to have been caused by the negligence of the defendant, it is *held* that the evidence sustains the conclusions of the jury that a vice principal directed a workman to work at a particular place, and then, without giving the usual signal, by his negligent act rendered the place dangerous, whereby the workman was injured.

Action in the district court for St. Louis county to recover $10,526 damages for personal injuries sustained while plaintiff was working as pitman in defendant's mine. The allegations of negligence in the complaint were as follows:

"That plaintiff and five of his co-employees, all known as pitmen, were sent by defendant to clean said ore from said track; that plaintiff took a shovel and began shovelling the fine ore off the track; that in doing said work his back was necessarily turned toward the other members of the gang who were engaged in placing a chain around one of the big, frozen chunks; that when the chain had been adjusted said chunk was lifted by order of the defendant, by use of a steam engine, situated upon said steam shovel, and swung around in such a way as to be directly over where plaintiff was engaged in said work; that said chunk was so moved without any notice or warning to plaintiff; that when it had reached a point directly over the plaintiff said chunk fell upon plaintiff, and broke his right leg at the ankle and also injured plaintiff's hips and back."

"That the said plaintiff did not at any time prior to said injury know, or have an opportunity to know that the chunk that fell upon him was being moved in such a way as to endanger him, or to be over his place of work. That it was also the duty of the said defendant to furnish sufficient lights situated at convenient places so that the plaintiff's said place of work should be properly lighted."

[1] Reported in 119 N. W. 490.

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The case was tried before Cant, J., and a jury which returned a verdict in favor of plaintiff for $3,000. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

E. C. Kennedy, for appellant.

John R. Heino and *Theo. Hollister,* for respondent.

ELLIOTT, J.

In a personal injury action the plaintiff recovered a verdict, and the defendant appealed from an order denying its motion for judgment notwithstanding the verdict or for a new trial. It is conceded that the respondent was injured while in the employ of the appellant, and the question on this appeal is whether he was injured under conditions which bring the case within the rule of Barrett v. Reardon, 95 Minn. 425, 104 N. W. 309, Berneche v. Hilliard, 101 Minn. 366, 112 N. W. 392, Cody v. Longyear, 103 Minn. 116, 114 N. W. 735, and Dizonno v. Great Northern Ry. Co., 103 Minn. 120, 114 N. W. 736, or of Jemming v. Great Northern Ry. Co., 96 Minn. 302, 104 N. W. 1079, 1 L. R. A. (N. S.) 696, and cases of that character. The distinction between these classes of cases is noted in the recent case of Lohman v. Swift & Co., 105 Minn. 148, 117 N. W. 418.

The appellant was operating an iron mine, and the respondent was in its employ working as a pitman. The ore was being taken from open pits by means of a steam shovel, which was being operated by a crew consisting of an engineer, craneman, foreman, and six pitmen. The ore and chunks of frozen dirt were being loaded onto cars, which were run upon a loading track situated about twenty feet from the track upon which the steam shovel operated. The ore was taken from the front of the shovel by a dipper, which was swung by means of a crane and boom to the loading track and there dumped onto the cars. When the ore had been taken out for a short distance in front of the steam shovel, the shovel was moved forward on the track. The track was then taken up from the rear of the shovel and placed in the front. The engineer who was in charge of the work was stationed on the shovel and operated the machinery which controlled the crane and dippers. As the cars were being loaded, more or less ore and dirt would fall upon the track, and this had to be cleaned away before

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another train of cars could come upon the track and be loaded. It was part of the respondent's duty to assist in cleaning this track.

The accident occurred at night, but the place was well lighted by means of artificial lights. A train load of ore had been taken away, and considerable ore and dirt remained on the loading tracks. The engineer called out, "Clean the track, everybody." The respondent took a shovel from the side of the car in full view of the engineer and went forward upon the track, where he commenced scraping and shoveling the dirt away. The other pitmen took the chain and put it around a chunk of frozen earth which had rolled upon the track. After the men had secured the chain around this chunk, one of them indicated to the engineer that it was all right, and without giving the customary warning, by calling "Look out!" or some such expression, the engineer started the engine, and the chunk of frozen dirt was lifted from the ground and swung around until it struck the respondent and broke his leg.

The situation was thus summarized by the trial court: The "plaintiff was directed to work at a particular place. While engaged in carrying out said direction the place in question was rendered unsafe by the act of the engineer. While plaintiff was working at the place to which he had been directed, it was the duty of the engineer to exercise ordinary care in seeing that such place was not rendered unsafe without giving plaintiff reasonable warning thereof." We think this fairly states the case. The question whether the engineer was a vice principal was submitted to the jury as a question of fact, and the evidence sustained the conclusion that he was acting in such capacity.

It is claimed that the pleadings were not in such condition as to justify submitting to the jury the question whether the respondent was ordered into a place of danger, which was afterwards rendered more dangerous without giving him proper warning. The allegations of the complaint are not very clear; but the question of variance was not raised until after the case reached this court, and on the merits we think it was not of sufficient importance to justify a reversal. Section 4158, R. L. 1905.

The questions raised upon the instructions given have been considered and found without merit.

Order affirmed.

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LAVERNE CITRUS ASSOCIATION v. CHICAGO GREAT WESTERN RAILWAY COMPANY.[1]

February 5, 1909.

Nos. 15,025—(65).

Injury to Fruit in Transit—Change of Theory on Appeal.

In an action for damages for injury to a carload of lemons, it was alleged that the lemons were shipped from a point in California to Chicago; that before their arrival they were, by order of shipper, diverted to Des Moines, and subsequently ordered sent on to the original consignee in Chicago; that the lemons arrived in Chicago in a damaged condition; and that the defendant, the last carrier, was liable for the damage. The answer denied the charge of negligence; alleged the diversion of the lemons to Des Moines, the refusal of the consignee there to receive them, and a subsequent direction to carry them on to Chicago to the original consignee; and also pleaded a provision in the bill of lading issued at Lordsburg with reference to the measure of damages. The case was tried on the theory of a continuous transportation from Lordsburg to Chicago; but the jury was instructed that the defendant was not liable for damages which may have been caused while the car was in Des Moines. The plaintiff proved the value and condition of the goods when delivered to the railway company at Lordsburg. *Held*, that the defendant, not having raised the question in its answer, or at any time during the trial, or on motion for new trial, cannot be heard on appeal to assert that the carriage from Des Moines to Chicago was under a separate and independent contract, and that the plaintiff should have shown the value and condition of the lemons in Des Moines at the time the order was given the defendant to carry the lemons on to Chicago.

Action in the municipal court of Minneapolis to recover $428 damages for injury to a carload of lemons caused by delay in transportation. The answer set up that the lemons were received by defendant and transported under a bill of lading which provided that the amount of any loss or damage for which any carrier became liable should be computed at the value of the property at the place and time of shipment. The case was tried before Charles L. Smith, J., and a jury. After the evidence was in, the court permitted plaintiff to amend its

[1] Reported in 119 N. W. 795.

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complaint to conform thereto in the amount demanded and the jury rendered a verdict in favor of plaintiff for $496. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

A. G. Briggs and *T. P. McNamara,* for appellant.

George C. Stiles and *M. C. Brady,* for respondent.

ELLIOTT, J.

This action was brought by the Laverne Citrus Association against the Chicago Great Western Railway Company to recover damages claimed to have been occasioned by injury to a carload of lemons shipped over the defendant's railway. The jury returned a verdict in favor of the plaintiff, and the defendant appealed from an order denying its motion for a judgment notwithstanding the verdict or for a new trial.

On May 4, 1905, respondent shipped the lemons from Lordsburg, California, consigned to themselves at Chicago, routed by way of the Atchison, Topeka & Santa Fé Railway to Kansas City, and thence over the Chicago Great Western Railway to Chicago. Subsequently the destination and consignee were changed by the shipper, so as to consign the lemons to Davidson Brothers at Des Moines, Iowa. The car passed over the Santa Fé Railway and was delivered to the appellant as connecting carrier at Kansas City, Missouri. The appellant carried it to Des Moines, Iowa, where it arrived on May 13, and was opened and inspected by Davidson Brothers. Two days later Davidson Brothers declined to accept the car. The appellant then wired the Santa Fé Railway Company, the initial carrier, for instructions as to the disposition of the car, and on May 17 was directed to ship it to one Woods at Chicago. As soon as the order was received, the car was sent on to Chicago, where it was delivered to Woods, with the lemons in a damaged condition. The plaintiff proved that when the lemons were delivered to the carrier in California they were in good condition and worth $652, and that they were in a damaged condition when delivered by appellant to the consignee in Chicago, and were sold for $156.

The questions raised on this appeal require reference to the pleadings and evidence in order to determine the manner in which the case was

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submitted to the trial court. The cause of action pleaded rested upon the theory that the original contract called for the carriage of the lemons from Lordsburg to Chicago, and that the diversion of the car to Des Moines did not, in view of the subsequent order, break the continuity of the transportation. The answer alleged that the defendants received the car for transportation at Kansas City to Des Moines, Iowa, consigned to Davidson Brothers, and that "thereafter defendant received an order for the diversion of said lemons from Des Moines, Iowa, to Chicago, Illinois, consigned to H. Woods." The allegations of negligence on the part of the defendant were denied, and the provision in the bill of lading issued by the initial carrier in California with reference to the measure of damages was set out, and the benefit thereof claimed by the defendant. We do not understand that the defendant thus pleaded an independent contract for the shipment of the goods to Chicago.

The case was submitted to the jury on the theory that the carriage from Lordsburg to Chicago was a continuous transportation, and, as there was evidence tending to show that the lemons were in good condition when delivered to the initial carrier and in bad condition when delivered to the consignee in Chicago, the presumption was that they were damaged while in the possession of the defendant, the last carrier. The defendant was seeking to escape liability for damages which might have resulted to the lemons while they were in Des Moines, and the court instructed the jury that the defendant was liable for any damage to the lemons caused by its negligence from the time of delivery to it at Kansas City until Davidson Brothers had a reasonable time to inspect them at Des Moines, and from the time they received instructions to carry them on to Chicago until they reached there and the consignee had time to inspect and unload them, but that it was not liable for what may have occurred between the time of the inspection by Davidson Brothers and the time of receiving the order to forward the car on to Chicago. The question of the possible liability of the defendant as a warehouseman was not suggested. At the request of the defendant the court also instructed the jury that "if the negligence of the plaintiff, or of the consignee, Davidson Brothers, at Des Moines, or of the consignee, Woods, at Chicago, contributed to the damage, the plaintiff cannot recover." The defendant was thus

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entirely relieved from liability for what may have occurred during the time referred to while the lemons were in Des Moines.

The plaintiff proved that the lemons were in good condition when delivered to the initial carrier in California, and at the close of the testimony the defendant's counsel stipulated that the measure of damages should be the difference between the reasonable market value at the shipping point, with freight charges added, and the reasonable market value at the point of destination on the day of arrival. The complaint was then amended, so as to make it conform to the evidence, by alleging damages in the sum of $496. This estimate was based on the value of the lemons as proven when they were delivered to the Santa Fé Railway at Lordsburg. The defendant's objection to the amendment of the complaint did not suggest that the transportation was not continuous from California to Chicago, and a motion to dismiss was based on the ground that there was no evidence of "ownership of the damage." The defendant's request for instructions seems to have assumed the general correctness of the theory upon which the case was submitted, and a motion for a new trial was made on grounds which did not suggest the present theory.

It is now contended that the lemons were in law delivered to the consignee at Des Moines; that after their inspection by Davidson Brothers, until they were ordered delivered to Chicago, the appellant was liable as a warehouseman only, and that no charge is made against it as such; that the transportation from Des Moines to Chicago was an independent shipment; and that the burden was therefore on the plaintiff to show the value and condition of the lemons when delivered at Des Moines. As we have seen, the appellant can now claim nothing by reason of the fact that it may have only been liable as a warehouseman, because the trial court instructed the jury that it was not during that time liable on any theory.

Nor in the condition of this record can the appellant be heard to assert that the carriage from Des Moines to Chicago was under a separate and independent contract. The importance of the claim is in the fact that, if correct, the plaintiff should have proved the condition and value of the goods at Des Moines, instead of Lordsburg, as the initial point. It is probable that there is sufficient evidence in the record to show that the lemons were in good condition in Des Moines,

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and of substantially the value as proven at Lordsburg; but, however this may be, it is probable that, if the question had been raised in the court below, the evidence could have been supplied. The defendant knew that the plaintiff was proceeding on a certain theory, and it would be manifestly improper to permit it to remain quiet until after the verdict was rendered, and then, after it was too late to supply the evidence, raise new questions not suggested by the pleadings or on the trial.

The other assignments of error do not require special consideration. They have been considered, and found to be without merit.

Order affirmed.

JOHN HRUSKA v. MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY.[1]

February 5, 1909.

Nos. 15,933—(177).

Encroachment on Highway—Evidence.

The evidence *held* to sustain the finding of the trial court that there was a public highway in front of the plaintiff's property and that the defendant had constructed its tracks thereon without authority.

Action in the district court for Le Sueur county to recover $3,000 damages for the wrongful use of the highway in front of plaintiff's dwelling for railroad purposes, and to restrain defendant from operating a railroad thereon or in any manner obstructing the free use of the street by the public and by plaintiff. The facts are stated in the opinion. The case was tried before Morrison, J., who made findings and as conclusion of law found that plaintiff was entitled to judgment enjoining defendant from maintaining its railroad upon the westerly six feet owned by plaintiff and that plaintiff recover one dollar damages. From an order denying the motion of defendant to amend the findings of fact and conclusions of law and for a new trial, it appealed. Affirmed.

[1] Reported in 119 N. W. 491.

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John I. Dille, Eugene Bryan, and *George W. Seevers,* for appellant.
A. J. Edgerton, for respondent.

ELLIOTT, J.

This is an appeal from an order denying the defendant's motion for a new trial, after an order for judgment enjoining and restraining the railway company from maintaining its tracks upon a certain street in front of the plaintiff's land.

In the year 1885 the respondent, Hruska, purchased from E. H. Phelps a tract of land twenty eight feet in width from north to south and eighty five feet in length from east to west, situated in block 19½ of Richter's addition to Montgomery, Minnesota. Hruska then entered upon and took possession of the land, and erected thereon a dwelling house, which he occupied some time in January 1886, and for more than twenty years thereafter, and until the commencement of this action. The deed, which was dated and delivered October 26, 1885, conveyed a tract of land described therein by metes and bounds, being twenty eight feet in width from north to south and seventy five feet in length from east to west. By this deed the grantor intended to convey the tract of land which had been sold to and taken possession of by Hruska, but by mistake of the scrivener it was made to convey a different tract of land. Hruska went into possession of the land under claim of title thereto by virtue of the deed made to him by Phelps, and did not discover that there had been a mistake made in the description in the deed until he had been in possession for more than fifteen years.

Some time in 1880 Hruska also purchased from August Richter a tract adjoining the land purchased from Phelps, and on the south line thereof, eighty five feet in length from east to west and fifty five feet in width from north to south, and erected thereon barns and stables, and on August 24, 1905, Richter executed to Hruska a conveyance of the two tracts or parcels of land which constitute the premises now claimed to be owned by Hruska. On January 12, 1892, Phelps conveyed to James Quirk the tract of land which was then in possession of Hruska, who then conveyed it to the James Quirk Milling Company, which, so far as it was able, gave the railway company the right to construct the tracks in question.

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When Hruska went into possession of the tract purchased of Phelps, there was in front and immediately west of the land a public way, and Hruska, in erecting his dwelling house, constructed it with the front end six feet east of the west line of his premises, and in front of the house laid a sidewalk six feet in width extending out to the public way, which constituted the only means of access to or egress from the said premises. For more than six years continuously, immediately prior to the construction of the track by the appellant, this public way was traveled, used, kept in repair, and worked as a public highway to the width of forty feet immediately west of the west line of the land so purchased and occupied by Hruska. In August 1906 the appellant entered upon the public way and constructed a track thereon, which occupies that part of the way immediately west of Hruska's land, to the injury and danger of Hruska. The court found these facts and ordered judgment enjoining the appellant from maintaining the railway bed and track upon the westerly six feet of the plaintiff's land and that the plaintiff recover one dollar damages.

The assignments of error question practically all the findings of the court, but the real question in the case is whether there is a highway west of the respondent's land. We think that the evidence sustains the finding upon this issue, and Hruska thus has the title to the six feet in question, subject to the easement of the public. It is clear that he suffered special damages which enables him to maintain this action. Carroll v. Wisconsin Central Co., 40 Minn. 168, 41 N. W. 661; Römer v. St. Paul City Ry. Co., 75 Minn. 211, 77 N. W. 825, 74 Am. St. 455. The plats and evidence are a trifle confusing, and some of the claims of parties are not very clear and consistent; but it is clear that Hruska has a good title to at least all of the land except the six feet which has been occupied by the railway company. There is some evidence tending to show that the public authorities recognized the land, of which the six feet is a part, as a public highway, and treated it as such, by making improvements thereon when needed and expending public money therefor. This use extended over many years, and as a whole the evidence was sufficient to sustain the finding that the street had been established by a common-law dedication. Brakken v. Minneapolis & St. L. R. Co., 29 Minn. 41, 11 N. W. 124. The respondent, being dependent upon this way for access to and egress from

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his premises, had a special interest in the street different from the general public. Shaubut v. St. Paul & S. C. R. Co., 21 Minn. 502; Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072.

Order affirmed.

PAUL O. NICOLAS v. ALBERT LEA LIGHT & POWER COMPANY.[1]

February 5, 1909.

Nos. 15,946—(195).

Use of Water Gauge—Questions for Jury.

The plaintiff, an engineer, was injured by the explosion of a glass water gauge upon a steam engine about which he was working. The gauge was of standard make and of a size in common use. A number of such gauges had exploded within a short time prior to the accident, and the plaintiff informed the superintendent that he would no longer work unless a gauge of smaller diameter was installed. The superintendent conceded that the smaller gauge would be safer and agreed to make the change. In reliance upon this promise the plaintiff continued work and was injured. *Held* that, while the original installation and use of the water gauge might not have been negligent, it was for the jury to determine whether the defendant was negligent in continuing to use that size gauge after it had knowledge that it was not safe when used in that particular place.

Questions for Jury.

The questions of contributory negligence and assumption of risk were for the jury to determine.

Action in the district court for Freeborn county to recover $10,000 damages for personal injuries caused by the explosion of a water gauge whereby plaintiff lost the sight of an eye. The case was tried before Kingsley, J., and a jury which returned a verdict in favor of plaintiff for $1,000. Defendant's motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

[1] Reported in 119 N. W. 503.

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Dunn & Carlson, for appellant.

Larrabee & Davies, A. J. Edgerton, and *N. E. Peterson,* for respondent.

ELLIOTT, J.

The respondent, Nicolas, while in the employ of the appellant, the Albert Lea Light & Power Company, was injured by the explosion of a glass water gauge in use upon a steam boiler about which he was working. In this action he recovered a verdict against the defendant for $1,000. The motion for judgment in favor of the defendant notwithstanding the verdict was denied, judgment was entered on the verdict, and the appeal is from the judgment. The sole question is: Was there any evidence to justify the trial court in denying the motion to direct a verdict for the defendant?

There was evidence tending to show that Nicolas was an assistant engineer, and his employment required him to work about the engines in the appellant's power plant. There had been trouble with the water gauges, and eight had exploded within the two months prior to the accident. Nicolas knew of the danger, and notified the superintendent that he would not continue to work unless a different size and quality of gauge was furnished in place of those they were and had been using. The superintendent agreed that a smaller gauge would be safer under the circumstances, but directed Nicolas to continue work, and promised that he would install gauges of smaller diameter, which would better resist the pressure of the steam. In reliance upon this promise Nicolas continued to work, and very soon thereafter was injured by the explosion of the old gauge. There had been ample time between the notice and the explosion to procure and install the new gauge. The plaintiff's case rested upon the claim that the defendant knew that the gauge which was then being used was too weak to stand the pressure, and that the plaintiff continued work upon the reliance of the promise to install a safe gauge in the place of the one which experience had shown to be unsafe.

The appellant contends that the evidence did not establish any negligence on the part of the defendant and that Nicolas was guilty of contributory negligence and also assumed the risk. It is conceded that the three-quarters-inch water gauge which had been and was then

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being used was in common use and of standard make, use, and quality. Had this accident occurred without any warning, this would have probably relieved the defendant from the charge of negligence. But it did not conclusively show that the defendant was not negligent in using that gauge in this particular place, after notice of what had happened, as five-eighths-inch gauges were also in common use and easily obtainable in the market. The superintendent conceded that the five-eighths-inch gauge would be safer. Within a short time prior to the accident eight three-quarters-inch gauges had exploded. In other places the three-quarters-inch gauge worked all right; but experience had shown that in this place, under the particular atmospheric conditions, there was serious danger in using it. It was not a question whether three-quarters-inch water gauges were generally safe, or whether it was negligence to originally install that size in this particular place. Experience had shown that there was serious danger that a three-quarters-inch gauge would explode when used in that place, and the question for the jury was whether with knowledge of that fact, the defendant was negligent to continue its use.

This made a question for the jury, and the case was properly submitted, unless the plaintiff was guilty of contributory negligence or assumed the risk. There was nothing in the evidence to justify the trial court in determining either of these questions as a matter of law. Nicolas recognized that working about the gauge involved danger; but the danger was not so great that the court could say as a matter of law that a reasonably prudent man would not have continued work for a reasonable time after the promise to make the change was made.

Judgment affirmed.

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JACOB MESHBESHER v. CHANNELLENE OIL & MANUFACTURING COMPANY.[1]

February 5, 1909.

Nos. 16,005—(249).

Sale of Impure Oil—Pure Food Statute—Liability.

The defendant sold to a retail grocer in the city of Minneapolis a quantity of oil, knowing that the same would be sold at retail to his customers for use in cooking their food. The plaintiff purchased of the grocer one quart of the oil for such purpose, which consisted of forty per cent. of mineral oil and sixty per cent. of cotton seed oil. It was injurious to health. His food, which he ate, was cooked in the oil, and he was thereby made seriously ill. Action to recover damages for the injuries so sustained. *Held:*

1. That the findings of fact of the trial court are responsive to the issues made by the pleadings, are supported by the evidence, and sustain the conclusion of law that the defendant is liable to the plaintiff for such damages.

2. Our pure food statute is intended to protect the health of all of the people of the state, and the plaintiff is within the class for whose benefit it is intended; and this case falls within the rule that, where a statute for the benefit or protection of individuals prohibits the doing of an act or imposes a duty, any person who violates the prohibition or neglects the duty is liable to those injured thereby for damages resulting proximately from such violation or neglect.

3. The plaintiff's injuries resulted proximately from defendant's failure to comply with the statute, for it sold the oil to the grocer, knowing that it was to be sold by him to his customers for food purposes. Teal v. American Mining Co., 84 Minn. 320, followed.

4. The fact that the defendant did not know that the oil was impure does not affect the question of its liability, for it was bound to know whether the article which it sold for food was wholesome and complied with the statute.

Action in the municipal court of Minneapolis to recover $500 damages for the manufacture and sale by defendant of impure oil for cooking purposes. The case was tried before Waite, J., who made findings of fact and as conclusion of law found in favor of plaintiff for

[1]Reported in 119 N. W. 428.

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$99. From an order denying defendant's motion for judgment or for a new trial, it appealed. Affirmed.

Thomas C. Daggett, for appellant.

George Harold Smith, for respondent.

START, C. J.

Appeal from the order of the municipal court of the city of Minneapolis denying the defendant's motion for judgment notwithstanding the findings of fact and conclusions of the trial court, or for a new trial.

The here material allegations of the complaint are to the effect following: The defendant is, and at all the times hereinafter mentioned was, engaged in the manufacture and sale to the public and retail dealers of sweet oil to be used as a food and for cooking purposes, and represented the same to be healthful and pure and adapted for use in cooking food. On or about February 9, 1908, plaintiff purchased from one Jacob Neiman, a retail grocer in the city of Minneapolis, one quart of sweet oil, so manufactured for sale by defendant and placed by it with Neiman for sale to the public, and used the same in cooking his food. The sweet oil so purchased by plaintiff was in fact impure and poisonous, and not adapted for cooking purposes, which facts were well known to defendant; but nevertheless defendant maliciously, carelessly, wantonly, and with a reckless disregard to human life, manufactured and placed the impure and poisonous oil on the market for sale, and caused the same to be sold to the plaintiff as pure and healthful cooking oil. The plaintiff, relying on such representations of the defendant, so purchased the impure and poisonous sweet oil and used it in cooking his food, which he ate, and thereby he was poisoned and made dangerously ill, to his damage in the sum of $500. The answer in effect was a general denial.

The issues were tried by the court without a jury, and findings of fact made in substance as follows:

In the city of Minneapolis during the month of February, 1908, defendant sold and delivered to one Jacob Neiman a quantity of oil, which was designed and intended to be used for mingling with human food in the process of cooking the same. Neiman was there engaged

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in the retail grocery trade. The oil was sold by the defendant to Neiman with the knowledge that the same would, in the regular course of his business, be sold at retail to his customers for use in cooking their food. Neiman sold and delivered to plaintiff one quart of the oil for such purpose. The oil was used in cooking the plaintiff's food, and in such use was mingled with it. The plaintiff partook of such food and of the oil mingled therewith. The oil at all times stated consisted of about forty per cent. of mineral oil and sixty per cent. of cotton seed oil. The mineral oil, when mingled in such proportion with cotton seed oil, is and was at all such times injurious to health, when taken into the human stomach; and the oil so sold and used, with the mineral oil therein contained, is and was at all such times injurious as stated. The plaintiff was made ill by so eating the food cooked in such oil, whereby he sustained damages in the sum of $99. Other than stated, the trial court found the allegations of the pleadings not true. As a conclusion of law judgment was entered for the plaintiff for such damages.

The statute (R. L. 1905, § 4362) providing for a motion for judgment notwithstanding the verdict has no application to a trial by the court without a jury. Hughes v. Meehan, 84 Minn. 226, 87 N. W. 768; Noble v. Great Northern R. Co., 89 Minn. 147, 94 N. W. 434; Young v. Grieb, 95 Minn. 396, 104 N. W. 131. The motion and notice of appeal are therefore irregular, and can be given effect only as an order denying a motion for a new trial.

The first contention of the defendant, in support of its claim that the trial court erred in denying its motion for a new trial, is to the effect that the action was brought to recover damages for the breach of an express warranty of the purity of the oil, of which there was no proof, but the court permitted a recovery upon an implied warranty; hence there was no evidence to sustain the allegations of the complaint. The assumption upon which the defendant's conclusion rests is not justified by the record. The complaint is indefinite in some respects, and it is not entirely clear that it does not attempt to allege more than one cause of action. But no motion was made to make it more definite, or to require the plaintiff to elect upon which alleged cause of action he would rely. Therefore the questions presented by the assignments of error are whether the findings of fact

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are responsive to the issues made by the pleadings, whether they are sustained by the evidence, and, if so, whether they justify the conclusion that the defendant is liable for the damages sustained by the plaintiff.

The defendant urges that the findings of fact are not responsive to the issues made by the pleadings, because the complaint alleges as a cause of action the breach of an express warranty. We are of the opinion that it does not. It is true that, to constitute a warranty the word "warranty" need not be used, and that a clear representation of the quality of a thing sold, made by a seller to the purchaser as a part of the contract of sale, and relied upon by him, is a warranty. If all of the allegations of the complaint herein are read and construed as a whole, it is manifest that it was not the intention of the pleader to declare upon an express warranty, and that the complaint cannot be fairly construed as alleging a breach of such a warranty. On the contrary, the complaint alleges no contractual relations between the parties, nor that any representations as to the purity of the oil were made by the defendant to the plaintiff. The representations were made, according to the allegations of the complaint, to the public, which were relied upon by the plaintiff. Such allegations, perhaps, are strictly not essential to the plaintiff's alleged cause of action, which sounds in tort, but proper as a matter of inducement.

The other allegations of the complaint here material are to the effect that the defendant carelessly and knowingly placed the impure and poisonous oil with a retail grocer for sale to the public as food; that the plaintiff, in ignorance of its true character, and relying upon the representations that it was pure and suitable to be used as food and for cooking purposes, purchased the impure oil from the retail grocer and so used it as a food, whereby he was poisoned and made dangerously ill. The other allegations, that the defendant acted wantonly and maliciously in the premises, are not essential to the plaintiff's cause of action. If they had been proven, they might have affected the assessment of damages.

It may be conceded, for the purpose of this appeal only, that, except for our pure food laws, or similar statutory provisions, the allegations of the complaint would not state a cause of action against the defendant; but, read in connection with the statute, we hold that

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they state a cause of action, for they show a neglect to discharge the duty imposed by the pure food statute and a violation of its prohibitions by the defendant. It was not necessary to plead the statute, as it is a public act. The statute (sections 1771 and 1775, R. L. 1905) prohibits and punishes as a misdemeanor the manufacture, sale, or offering for sale of any article as food, if it in itself is injurious, or if it contains any ingredient injurious to health. This statute is intended to protect the health of all of the people of the state. Clearly the plaintiff belongs to the class for whose benefit the statute is intended.

The complaint and the findings of fact of the trial court bring this cause within the rule that where a statute for the protection or benefit of individuals prohibits a person from doing an act, or imposes a duty upon him if he disobeys the prohibition or neglects to perform the duty, he is liable to those for whose protection the statute was enacted for damages resulting proximately from such disobedience or neglect. Negligence is implied from a violation of the statute. Bott v. Pratt, 33 Minn. 323, 23 N. W. 237, 53 Am. 47; Baxter v. Coughlin, 70 Minn. 1, 72 N. W. 797. The plaintiff's injuries in the case resulted proximately from the defendant's failure to comply with the statute, for it sold the impure oil to the plaintiff's grocer, knowing that in the regular course of his business it would be sold to his customers for use in cooking their food. Moon v. Northern Pacific R. Co., 46 Minn. 106, 48 N. W. 679, 24 Am. St. 194; Teal v. American Mining Co., 84 Minn. 320, 87 N. W. 837; 15 Harvard L. Rev. 666. See, in this connection, the case of Huset v. J. I. Case T. M. Co., 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303.

The fact that the trial court did not find that the defendant knew that the oil was impure does not affect the question of its liability; for it was bound to know whether the article, which it sold to be retailed to the customers of the purchaser for food purposes, was sound, wholesome, and complied with the statute. This is a salutary and necessary construction of our pure food statute, which in this respect is analogous to statutes prohibiting the sale of liquor to minors, in construing which courts uniformly hold that an honest belief that the minor was twenty one years of age is no defense. See State v. Shevlin-Carpenter Co., 99 Minn. 158, 166, 108 N. W. 935.

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The defendant urges that the trial court held the defendant liable on an implied warranty. The only basis in the record for this claim is that the trial court, in ruling on the admissibility of evidence in answer to the claim of defendant's counsel that the plaintiff must show an express warranty, said: "There is always an implied warranty that articles sold for food are fit for food. I shall rely on the theory until I am satisfied to the contrary." But the court's findings of fact and memorandum show that it did not proceed upon the basis of an implied warranty, but upon the negligence of the defendant implied from a violation of the pure food statute.

The defendant further urges that the facts are not supported by the evidence, because it leaves the question whether the oil which the plaintiff ate made him ill as a matter of pure speculation. On examination of the record we are satisfied that the evidence is ample to sustain a finding that the plaintiff's illness was caused by the impure oil. It follows that the findings of fact are sustained by the evidence, that they are responsive to the issues made by the pleadings, and that they sustain the court's conclusion of law. We do not find any reversible errors in the trial court's rulings as to the admission of evidence.

Order affirmed.

CHRISTOPHER J. JOHNSTON v. WILLIAM E. JOHNSTON.[1]

February 11, 1909.

Nos. 15,870—(216).

Limitation of Actions—Discovery of Fraud.

The statute of limitations does not commence to run against an action to set aside a partnership accounting on the ground of fraud until discovery of the fraud.

Same—Recovery of Trust Funds.

The statute of limitations commences to run against an action for the recovery of trust funds upon the performance of the trust, or when the trustee repudiates the trust, and the cestui que trust is notified there-

[1] Reported in 119 N. W. 652.

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of. The mere lapse of time, without inquiry into the trusteeship, does not of itself constitute such laches as to preclude recovery.

Item Barred by Limitation.

The statute of limitations began to run against the $4,000 item involved in this case from the time respondent discovered that it had been paid to appellant's intestate.

Action in the district court for Winona county against the administrator of Frank A. Johnson to rescind an agreement of settlement entered into in October, 1890, between plaintiff and defendant's intestate, and for an accounting in the matters of a partnership between plaintiff and said Frank A. Johnston relating to the mining business, and for an accounting in matters of said intestate's agency for plaintiff, on the ground that such settlement was procured by the false representations of the deceased to the plaintiff. The facts are stated in the opinion. The case was tried before Snow, J., who made findings and ordered judgment in favor of plaintiff in the sum of $25,082.32, and that on the payment thereof plaintiff must quitclaim to defendant one half of his interest in certain mines and mill sites. From the judgment entered pursuant to the findings, defendant appealed. Modified.

Fitzpatrick & Buck, for appellant.

The mere fact that the aggrieved party did not actually discover the fraud will not extend the statutory limitation, if it appears that the failure sooner to discover it was the result of negligence and inconsistent with reasonable diligence. First National Bank of Shakopee v. Strait, 71 Minn. 69; Dunn v. Taylor, 42 Tex. Civ. App. 241; Boren v. Boren, 38 Tex. Civ. App. 139; Arkins v. Arkins, 20 Colo. App. 123; Donaldson v. Jacobitz, 67 Kan. 244; Dole v. Wilson, 39 Minn. 330; Morrill v. Madden, 35 Minn. 493; Marks v. Evans, 129 Cal. 18; Goggins v. Risley, 13 Pa. Sup. Ct. 316; Vodrie v. Tynan (Tex. Civ. App.) 57 S. W. 660; School District of DeWeese, 100 Fed. 705, 708; Nave v. Price, 108 Ky. 105; Hughes v. Littrall, 75 Me. 573; Rogers v. Brown, 61 Mo. 187, 189; Clark v. Van Loon, 108 Iowa, 250; Reisse v. Clarenbach, 61 Mo. 310; Laird v. Kilbourne, 70 Iowa, 83; Gebhard v. Sattler, 40 Iowa, 152; Bishop v. Knowles, 53 Iowa, 268; Wright v. Davis, 28 Neb. 479; Nash v. Stevens, 96 Iowa, 616; Hawley v. Page,

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77 Iowa, 339. Plaintiff contends that these authorities are not applicable to this case for the reason that the relation of partners existed between the two and that Frank was bound to disclose the truth about the partnership property. There is nothing in the evidence that any of the property owned by Frank privately and personally belonged in any manner to the partnership. The partnership was formed for the purpose of locating mines in Idaho and selling interests in those mines to the "tenderfeet" in the East, and that was its only purpose. Frank's alleged false and fraudulent statements were concerning his own ability to pay his indebtedness to his partner arising out of the partnership transactions, and were no fraud upon his partner as such.

The statement by Frank to the agent of his brother that everything was gone, both his own property and his brother's, was evidence and notice to the plaintiff of a repudiation or of a breach of trust on his part. The relationship, from that moment, of trustee and cestui que trust ceased to exist. Mrs. Johnston and the plaintiff then knew that Frank had not been carrying out the terms of the trust. Frank became the debtor to his brother of the amounts then and there settled upon and admitted, and the statute of limitations commenced to run at that time in his favor. Wilson v. Welles, 79 Minn. 53; Smith v. Glover, 44 Minn. 260, 28 Am. & Eng. Enc. (2d Ed.) 1134, and cases there cited.

Brown, Abbott & Somsen, for respondent.

The plaintiff's position on the question of the statute of limitations is: (1) That the relation of Christopher and Frank as regards the partnership transactions was one of trust; that each owed the other the utmost good faith in reference to it. (2) That by means of false statements which constituted a violation of this obligation, Frank induced the plaintiff to make an agreement releasing him from all liability growing out of the partnership relation. (3) That the falsity of these statements was not discovered until about the time of the commencement of this action and consequently that the statute has not run against the action to set aside the release. (4) That if the statute of limitations has run against an action for accounting upon the partnership transactions, the plaintiff was induced to refrain from bringing

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his action for an accounting solely by reason of defendant's fraud, and that when the release has been rescinded the defendant is estopped by the settled principles of equity from asserting the statute of limitations. (5) That all moneys sent to Frank for investment were held by him under an express trust, and there has never been an accounting because of the false statements of Frank, to the effect that the property held in trust was "all gone." (6) That Frank is estopped to assert the statute of limitations as against the action for accounting after having induced the delay in demanding the accounting. (7) That there has been no repudiation of the trust and the statute has not commenced to run against it.

The statute of limitations did not run against the action to rescind the release. R. L. 1905, § 4076, subd. 6. The defendant is estopped to assert the statute of limitations against the accounting. Can a partner misrepresent the character, condition or existence of partnership property to his copartner, and by means of such misrepresentation procure a release of all claims and demands growing out of the partnership relations for an inadequate consideration, and then plead the statute of limitations when his fraud is discovered after the period of six years? Can a trustee falsely represent that all the trust property is lost and gone, and plead the statute of limitations as a defense to an action for an accounting after the expiration of six years after the making of the false statement? We do not think the statute of limitations has any application to the trust transactions, but assuming for the sake of the argument that it has, we will place the two propositions in the same category and argue them together. Good faith of the trustee toward the cestui que trust is one of the fundamental requirements of the trust relation. A court of equity will not permit a trustee to deceive the cestui que trust as to his profits, and then plead the statute of limitation because the fraud is not discovered for six years. Ludington v. Patton, 111 Wis. 208.

This trust was an express continuing trust. No restriction was placed upon Frank as to the nature of the investments which he should make, but it was expressly agreed that he should take this money and invest it for the benefit of Chris and return it to him. This was not a trust implied, but one created by the agreement of the parties and hence comes within R. L. 1905, § 4076, subd. 7. Wilson v. Welles, 79

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Minn. 53; Stillwater & St. P. R. Co. v. City of Stillwater, 66 Minn. 176. At the time Susan came to Winona Frank had not repudiated this trust or neglected to discharge it, or claimed to have fully performed it, and hence the statute had not commenced to run under subdivision 7. Nor had it commenced to run at all. Smith v. Glover, 44 Minn. 260; Donahue v. Quackenbush, 62 Minn. 132; Thompson v. Crosby, 62 Minn. 324; Lamberton v. Youmans, 84 Minn. 109.

A trust of this nature is not within the statute of limitations because the possession of the trustee is presumed to be the possession of the cestui. Speidel v. Henrici, 120 U. S. 377, 386.

LEWIS, J.

Respondent, Christopher J. Johnston, and Frank A. Johnston, deceased, were brothers. The former resided in the territory of Utah in 1878, and Frank in the city of Winona. During that year they entered into a copartnership agreement for the purpose of acquiring, locating, developing, and disposing of mining properties. In 1890 the partnership was dissolved, at which time Frank was indebted to Christopher in a large amount of money growing out of the partnership business, and also in a large amount which had been intrusted to him for investment. In full settlement of the partnership indebtedness Frank paid to respondent the sum of $3,000, deeded to him certain property in Winona, and released all of his interest in the mining property held by the partnership, and was thereby released from all obligations by an instrument in writing. Nothing further transpired until the decease of Frank on August 24, 1905. William E. Johnston having been appointed administrator of the estate, this action was commenced for the purpose of setting aside the settlement and release, and to recover the full amount of the partnership indebtedness, with interest, upon the ground that respondent was induced to enter into the settlement and to execute the release upon the fraudulent representation by Frank that he was insolvent and unable to pay the amount in full, or any other amount than as provided by the terms of the release, whereas he was worth at that time at least $60,000, and also to recover the trust fund.

The trial court found that the partnership was formed in 1878 and continued until 1890, during all of which time respondent was engaged

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in acquiring and developing mining properties for the benefit of the partnership, and that Frank was engaged in making sales thereof; that at the time the partnership was dissolved, October 20, 1890, Frank was indebted to respondent in the sum of $20,011.42 on account of moneys made in the partnership business; that from time to time, from 1882 to 1886, inclusive, respondent intrusted to his brother at Winona for investment the sum of $19,500, of which amount Frank invested $9,400 in the name of respondent, but the balance of $10,100 so intrusted to him was never invested in any way and was never accounted for up to the time of his death; that prior to the month of October, 1890, respondent had made repeated efforts to secure a settlement with his brother, and, being unable to do so, he designated his wife, Susan M., to go to Winona for the purpose of making settlement, if possible; that Mrs. Johnston arrived at Winona, and spent fifteen days in endeavoring to arrange a satisfactory settlement of the partnership business and trust affairs; that at such time Frank did not deny that he owed the amounts claimed by his brother, but represented to Mrs. Johnston that the moneys received by him in the sale of partnership property and the moneys intrusted to him for investment were lost; that to settle the partnership account he was unable to pay any more than $3,000 in money ($2,000 of which he would have to borrow) and turn over two certain lots in Winona, with a small dwelling thereon; that Mrs. Johnston relied upon such representations, accepted the proposition, entered into an agreement of settlement, and signed an instrument in writing, of date October 20, 1890, which instrument acknowledged the receipt of $2,000 in cash, a note for $1,000 due March 1, 1891, at eight per cent., and a deed of two certain lots in Winona, in settlement of all claims arising out of the partnership transactions. The instrument also released respondent's interest in a certain block in Winona, and Frank relinquished to respondent all claims to the mining properties involved in the partnership, with two exceptions. The court found that this writing did not cover, refer to, or affect the claim of respondent against his brother on account of the funds sent in for investment.

It was found that Frank's representations to Mrs. Johnston that he was poor and unable to pay more than the amount stated in the agreement were false, and known to him to be so; that in fact he was

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the owner of a large amount of property, and was worth at least the sum of $60,000. The court also found that an examination of the records at the register of deed's office would have disclosed the fact that such representations were not true, and that Frank was the owner of a large amount of real estate; that Mrs. Johnston made no examination of the records, but confined her inquiry to some of Frank's intimate friends residing in Winona, by whom she was told that no one knew how much he owed or how much he was worth. These representations were reported to respondent by his wife, accepted by him as true, and he therefore refrained from making additional investigation until after the death of his brother. The court directed judgment for respondent for the sum of $25,082.32, upon the payment of which sum respondent was directed to deed to the administrator the undivided one-half interest to all of the partnership mining property.

The findings of the court settle whatever dispute there may have been with reference to the facts. It is immaterial whether the settlement made October 20, 1890, was a complete partnership accounting, or whether Frank accepted the statement of accounts as presented by Mrs. Johnston without presenting his side of the account. The findings of the court foreclose any inquiry into that question. That the partnership was dissolved, and that, upon Frank's admission, he was indebted to his brother in the sum of at least $20,011.42, and that the mining property released by Frank was of no value, was established by the evidence. That Frank admitted the indebtedness and falsely represented his ability to pay it is fully settled by the findings.

However, appellant seriously contends that Mrs. Johnston was not justified in accepting the representations as to his ability to pay the full amount. A careful examination of the records in the register's office would have disclosed what property belonged to Frank Johnston at that time, and by following up the inquiry knowledge might have been obtained as to its value. Perhaps a persistent inquiry among the citizens of Winona might have disclosed that he was financially responsible. But Mrs. Johnston was dealing with her brother-in-law, whom her husband had implicitly trusted for a long period of years, not only by permitting him to attend to all of the partnership affairs, but also by intrusting to him for investment money to the extent of $19,000. Mrs. Johnston was a stranger in Winona, not acquainted with

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the method of ferreting out property through the public records, and to a certain extent she was in a hostile country, among the friends of the other party. Although she did not appreciate this condition, the answers to her inquiries from Frank's friends conveyed the impression to her that his representations might be true.

The evidence is ample to support the court's conclusion that Mrs. Johnston accepted the statements of her brother-in-law in perfect good faith, and was not required to prove the contrary by running down the records. The period of time elapsing from 1890 to 1905, when the fraud was first discovered, was a long time, and, the party charged with the fraud being dead, the evidence was examined with great care by the trial court, and the findings as to the amount due are based upon documentary evidence. The relation of the parties was of such confidential character, and the method of conducting the business was such, that respondent was not guilty of laches in permitting the time to pass without investigation. Respondent was a mining man, for a large part of the time employed in the mountains, leaving the transactions of business matters largely to his wife. Nothing occurred to challenge the correctness of the representations as to Frank's ability to pay his indebtedness until after his death. In 1899 respondent and his wife visited Winona, met the brother, and had conversation with him with respect to his business affairs; but nothing at that time occurred to put them upon inquiry. Respondent could not be called upon to repudiate the transaction until he knew of facts which would lead a prudent man to make inquiry.

The only incident of importance bearing on the question occurred at the very outset, in 1890. At that time the brother represented to Mrs. Johnston that, in addition to the sum of $3,000 to be paid, she would be able to collect $4,000 from a Mr. Coleman of La Crosse. After the settlement was made and the agreement in writing signed, Mrs. Johnston went to La Crosse for the purpose of collecting this amount, and found that it had already been paid to Frank, which he admitted. At this time she had notice that a misrepresentation had been made to her. She had reason for being influenced by his apparent financial distress, and the conduct of respondent and his wife showed beyond doubt that they believed their brother was not able to pay the full amount of the indebtedness. The law on this subject is fully set-

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tled. Maxfield v. Schwartz, 45 Minn. 150, 47 N. W. 448, 10 L. R. A. 606; Erickson v. Fisher, 51 Minn. 300, 303, 53 N. W. 638; McCarty v. New York Life Ins. Co., 74 Minn. 530, 77 N. W. 426; Eggleston v. Advance Thresher Co., 96 Minn. 246, 104 N. W. 891.

Respondent was entitled to set aside the agreement of settlement on the ground of fraud, and under the provisions of subdivision 6, § 4076, R. L. 1905, the statute of limitations did not commence to run against that right until the fraud was discovered. The following actions have been held to come within this statute: Actions to set aside fraudulent conveyances. Duxbury v. Boice, 70 Minn. 113, 72 N. W. 838. An action on money appropriated by an agent. Cock v. Van Etten, 12 Minn. 431 (522). With like effect the statute applies to contracts of settlement between partners; hence the statute did not commence to run until the fraud was discovered.

What has been said with reference to the false representations concerning the partnership indebtedness, and respondent's reliance thereon, has application in determining the relation of the parties with reference to the trust funds. The amount of money sent by respondent to his brother Frank for investment was pursuant to an agreement entered into on one of Frank's visits to respondent in the West. The money was sent from time to time, but no statement was ever made whether it was invested, and no account was ever rendered. When the partnership settlement was made in 1890, Frank claimed that all that money was lost, and no effort was made to secure a settlement of that account. If respondent and his wife were justified in relying upon Frank's statements as to his ability to pay the partnership indebtedness, there is no reason for assuming that they waived any of their rights with respect to the trust money simply because they did not insist upon settlement at that time. If, as respondent was informed, Frank was unable to pay any amount in cash without borrowing, he was fully justified in accepting the situation and in not pressing the payment of the trust funds.

The record fails to disclose the occurrence of anything during the succeeding years which suggests that Frank ever attempted to deny the amount due, or to repudiate the trust. The trust was expressly created by contract. Subdivision 7, § 4076, R. L. 1905, provides that an action to enforce such a trust, or to compel a trustee to account,

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must be brought within six years, where the trustee has neglected to discharge the trust or claims to have fully performed or repudiated the trust relation; but the statute does not begin to run in such cases until the trust has been performed, or until the trustee repudiates the relation, and the cestui que trust has received notice thereof. Wilson v. Welles, 79 Minn. 53, 81 N. W. 549. The mere lapse of time without inquiry as to the condition of the trust by the cestui que trust does not, of itself, constitute such laches as to prevent him from enforcing the trust. Lamberton v. Youmans, 84 Minn. 109, 86 N. W. 894.

However, we find ourselves unable to accept the views of the learned trial court upon one point, viz., with respect to the $4,000 item, with reference to which the court seems to have been of opinion that the statute did not run against it for the reason that the release operated upon the whole account, and, the release being rescinded upon the ground of fraud, the whole account was revived. But the $4,000 item is not mentioned in the release, and, although Mrs. Johnston may have been induced to execute the release in part upon the belief that she would be able to collect the $4,000, upon going to La Crosse she discovered that she had been deceived as to that item, and was then put in possession of every fact to enable her to take advantage of the fraud. Respondent might have repudiated the entire settlement, or, within the statutory limit, he might have commenced an action to recover that amount from Frank. Respondent elected to stand upon the settlement and to accept his brother's promise to make the amount good. The time within which to enforce respondent's rights as to this item expired within six years from the date of discovering the fraud, and the judgment must be modified accordingly.

So ordered.

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GEORGE S. WYCKOFF v. JOHN WUNDER.[1]

February 11, 1909.

Nos. 15,936—(204).

Employing Agent as Master.

The relation of master may be assumed by one who employs another, even though he is an agent merely for the purpose of supervising the work.

Negligence in Construction of Scaffold.

One who employs another to work in proximity to a scaffold erected for the convenience of other workmen is required to exercise due care in the construction of the scaffold, and to see that it is reasonably safe for the purpose.

Action in the district court for Hennepin county to recover $10,250 for personal injuries. The complaint alleged that the defendant, in his business of general contractor, employed plaintiff in the capacity of general laborer on a certain building; that defendant in that work caused to be erected and maintained a scaffold and platform and that defendant was negligent in its construction; that plaintiff while in the line of his duty and by defendant's direction went under said scaffold and as the result of said negligence it fell upon and crushed him. The answer denied the negligence and set up that defendant was acting solely in the capacity of superintendent of the Armory Commission. The case was tried before Dickinson, J., who denied a motion at the close of the evidence to direct a verdict for defendant, and a jury which rendered a verdict in favor of plaintiff. A motion for judgment notwithstanding the verdict or for a new trial was denied, and from the judgment entered upon the verdict, defendant appealed. Affirmed.

Morton Barrows, for appellant.

Dodge & Tautges, W. E. Hewitt, and *Edward M. Nash,* for respondent.

[1] Reported in 119 N. W. 655.

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LEWIS, J.

Respondent was injured by the falling of a scaffold which had been erected in the Armory building in Minneapolis, for the purpose of accommodating the plasterers in their work on the ceiling. Appellant moved for judgment notwithstanding the verdict, and the correctness of the order in denying that motion is the question for review.

The Armory Commission of the city of Minneapolis had let a contract for the construction of an armory building, and, the contractor having failed to carry out his agreement, the commission entered into a contract with appellant whereby he agreed to oversee and supervise the work of completing the building, to provide suitable men to conduct the work during his absence, and to hire the labor and purchase the material necessary therefor upon the terms and conditions named in the contract. Appellant was to furnish, on his own account, tools, scaffolding, and other equipment that might be necessary, with the right to use such tools, scaffolding, and other equipment as were then upon the premises. The Armory Commission were to pay all bills monthly as itemized, and appellant's compensation was fixed at five per cent. on the total amount of the money that might be expended. Appellant was a general building contractor, and in prosecuting the work engaged a man by the name of Franklin as his general foreman, and authorized him to employ the necessary laborers and workmen. Respondent was hired by Franklin, although he was paid, as were the other workmen, by the commission.

The scaffolding was about ten feet high, and was constructed under the direction of a carpenter who received his instructions from Franklin. As constructed, two sections were supported with so-called cross or X braces, which were later taken off by the direction of Franklin, and with appellant's knowledge, for the reason that they might interfere with the men engaged in other work, and straight braces were substituted. Franklin testified that to complete the scaffold it was his intention to put braces on the upper part of it, but before that was done Franklin directed some of the workmen to place some planks on the top of the scaffold for the plasterers to stand on, and gave directions how those planks should be handled; that they should be brought in through a certain door and handed up lengthwise, at the end. After the men had passed up several planks in this manner, they changed

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the method and began to shove them through the window onto the scaffold from one side, and appellant claims that the lateral pressure so brought to bear caused the scaffold to sway and collapse.

1. A determination of the actual relation between the commission and appellant is not necessary to a decision in this case. Conceding that, as between himself and the commission, appellant was an agent or representative, employed for the purpose of performing certain acts for his principal, it does not follow that he could not and did not assume the relation of master to respondent. He was required to furnish the necessary material, tools, and scaffolding, in addition to such as might be on the premises, and was authorized to employ the necessary labor. He was a contractor in general business. His foreman, Franklin, had been in his employ for a considerable time as such, and respondent had also been previously employed to work for appellant under Franklin. There is no evidence that respondent was informed as to the relation existing between appellant and the commission. He was taken from one place and put to work at another, under such conditions as led him to suppose that he was employed by the same master. Whatever Franklin did in the performance of the work, under the direction, or with the knowledge and acquiescence, of appellant, was the act of appellant in so far as respondent was concerned.

2. Whether the scaffold was in fact complete is not material. The question is: Did it fall, by reason of inherent weakness or improper bracing, through the negligence of appellant? If certain braces necessary to its safety were taken off, and those substituted were not equivalent, then it was not sufficiently constructed, and in that sense incomplete. Franklin testified that he realized the scaffold was not safe for the purpose of receiving the planks from the side, and consequently gave directions to put them up from the end. If the scaffold, as constructed, was reasonably safe for the purpose intended, and the cause of its collapse was the manner in which the planks were handled, then appellant was not responsible. The evidence was somewhat conflicting, and was submitted to the jury in a charge which fully set forth the claims of the respective parties, and we are of opinion that the evidence justified the jury in finding that appellant failed to exercise ordinary care in constructing the scaffold, and that it fell by reason of its inherent weakness.

Affirmed.

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HELEN A. THOMPSON v. CHARLES BAXTER.[1]

February 11, 1909.

Nos. 15,939—(214).

Tenancies Defined.

The essentials of tenancies at will, at sufferance, and from month to month pointed out, and distinguished from life estates.

Lease Construed to Give Life Estate.

A lease of urban real property, conditioned respecting the term of the tenancy in the following language: "To have and to hold the above-rented premises unto the said party of the second part, his heirs, executors, administrators, and assigns, for and during the full term of while he shall wish to live in Albert Lea, from and after the first day of December, 1904"—*held* to vest in the tenant a life estate, terminable only at his death or removal from Albert Lea.

Action in the district court for Freeborn county, on appeal from justice court, for restitution of premises claimed to be unlawfully held. There was no dispute as to the facts and the case was tried without a jury before Kingsley, J., who found that defendant was entitled to a life estate in the premises and ordered that the action be dismissed. From this order, plaintiff appealed. Affirmed.

N. E. Peterson, for appellant.

Dunn & Carlson and *John G. Skinner,* for respondent.

BROWN.

Proceedings in forcible entry and unlawful detainer, instituted in justice court, where defendant had judgment. Plaintiff appealed to the district court, where a like result followed. From the judgment of that court she appealed to this court.

The action involves the right to the possession of certain residence property in the city of Albert Lea, and was submitted to the court below upon the pleadings and a stipulation of facts. It appears that plaintiff is the owner of the premises; that she acquired title thereto by purchase from a former owner, who had theretofore entered into a contract by which he leased and demised the premises to defendant

[1] Reported in 119 N. W. 796.

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at an agreed monthly rent of twenty two dollars; and plaintiff's title is subject to all rights that became vested in defendant thereby. The lease, after reciting the rental of the premises and other usual conditions, contained upon the subject of the term of the tenancy, the following stipulation: "To have and to hold the above-rented premises unto the said party of the second part [the tenant] his heirs, executors, administrators, and assigns, for and during the full term of while he shall wish to live in Albert Lea, from and after the first day of December, 1904." The only question involved under the stipulation is the construction of this provision of the lease. Defendant has at all times paid the rent as it became due; but, if plaintiff has the right to terminate the tenancy and eject him, proper notice for that purpose has been given. Appellant contends that the lease created either a tenancy at will, at sufferance, or from month to month, and that plaintiff could terminate the same at any time by proper notice. The trial court held, in harmony with defendant's contention, that the contract created a life estate in defendant, terminable only at his death or removal from Albert Lea. Appellant assigns this conclusion as error.

A determination of the question presented involves a construction of the lease and a brief examination of some of the principles of law applicable to tenancies at will, at sufferance, from month to month, and life estates. Deeds, leases, or other instruments affecting the title to real property are construed, guided by the law applicable to the particular subject, precisely as other contracts are construed, and effect given the intention of the parties. Lawton v. Joesting, 96 Minn. 163, 104 N. W. 830; Whetstone v. Hunt, 78 Ark. 230, 93 S. W. 979, 8 Am. & Eng. An. Cas. 443, and extended note. The contract before us, though somewhat peculiar and unusual as to the term of the tenancy intended to be created, is nevertheless clear and free from ambiguity. It granted the demised premises to defendant "while he shall wish to live in Albert Lea." The legal effect of this language is, therefore, the only question in the case.

Tenancies at will may be created by express words, or they may arise by implication of law. Where created by express contract, the writing necessarily so indicates, and reserves the right of termination to either party, as where the lease provides that the tenant shall occupy the premises so long as agreeable to both parties. Richardson v.

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Langridge, 4 Taunt. 128; Say v. Stoddard, 27 Oh. St. 478. Such tenancies arise by implication of law where no definite time is stated in the contract, or where the tenant enters into possession under an agreement to execute a contract for a specific term and he subsequently refuses to do so, or one who enters under a void lease, or where he holds over pending negotiations for a new lease. The chief characteristics of this form of tenancy are (1) uncertainty respecting the term, and (2) the right of either party to terminate it by proper notice; and these features must exist, whether the tenancy be created by the express language of the contract or by implication of law. An accurate definition is given in 1 Wood, Landlord & Tenant, 43, in the following language: "A tenant at will is one who enters into the possession of the lands or tenements of another, lawfully, but for no definite term or purpose, but whose possession is subject to termination by the landlord at any time he sees fit to put an end to it. He is called a tenant at will 'because he hath no certain or sure estate, for the lessor may put him out at what time it pleaseth him.'"

A tenancy at sufferance arises where the tenant wrongfully holds over after the expiration of his term, differing from the tenancy at will, where the possession is by the permission of the landlord. 4 Kent, Com. 117; Edwards v. Hale, 9 Allen (Mass.) 462. He has a naked possession without right, and, independent of statute, is not entitled to notice to quit. 1 Wood, Landlord & Tenant, § 8. It also arises where a mortgagor holds over after the expiration of the period of redemption on foreclosure. Stedman v. Gassett, 18 Vt. 346. In fact, this relation exists in all cases where a person who enters lawfully into the possession wrongfully holds possession after his estate or right has ended. Kinsley v. Ames, 2 Metc. (Mass.) 29; Jackson v. McLeod, 12 Johns. (N. Y.) 182; 2 Blackstone, 150; 1 Wood, Landlord & Tenant, 7.

A tenancy from month to month or year to year arises where no definite time is agreed upon and the rent is fixed at so much per year or month, as the case may be, and is terminable at the expiration of any period for which rent has been paid. Finch v. Moore, 50 Minn. 116, 52 N. W. 384. This form of tenancy can never exist where the lease or contract prescribes a fixed time. The mere fact that rent is payable monthly does not alone determine the character of the tenancy.

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The monthly or yearly payments and an intention to limit the term to a month or year must in all cases concur to create this species of tenancy.

From these general principles of the law of tenancy it is quite clear that the lease under consideration does not come within either class mentioned. Its language does not expressly define it as a tenancy at will, and no such relation arises by implication, for the reason that the term is not indefinite, within the meaning of the law on this subject, nor is the right to terminate the lease reserved to the lessor. Indefiniteness or uncertainty as to the term of the lease is illustrated by instances where one occupies land by the naked permission of the owner (Hull v. Wood, 14 Mees. & W. 681; Williams v. Deriar, 31 Mo. 13; Larned v. Hudson, 60 N. Y. 102), or a person who holds under a void deed (Stamper v. Griffin, 20 Ga. 312, 65 Am. Dec. 628; Executors v. Houston, 16 Ala. 111), or where he enters under an agreement for a lease not yet executed (Emmons v. Scudder, 115 Mass. 367), or under a lease until the premises are sold (Lea v. Hernandez, 10 Tex. 137; Ela v. Bankes, 37 Wis. 89), and under various circumstances where no time is specifically agreed upon. In the lease under consideration the tenancy is limited by the time defendant shall continue to dwell in Albert Lea, and this limitation takes the case out of the class of tenancies at will. It is equally clear that a tenancy at sufferance was not created by the contract. There has been no wrongful or unlawful holding over after the expiration of the term. Nor does the rule of tenancy from month to month apply for the reasons already pointed out.

We therefore turn to the question, the turning point in the court below, whether the instrument created a life estate in defendant within the principles of law applicable to that branch of land titles. It is thoroughly settled that a life estate may be created by a deed, lease, or devise, either with or without a stipulation for the payment of rent. This class of tenancies differs in many essential respects from tenancies at will, or from year to year, or at sufferance; the principal distinction being that the former confers a freehold upon the tenant, and the latter a mere chattel interest. The lease under consideration embodies all the essentials of a life tenancy. It contains the usual words of inheritance, necessary at common law, running to defendant, "his heirs,

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executors, administrators, and assigns," and grants the right of occupancy for the term stated therein.

Life estates or life tenancies are clearly defined in the books, and the lease here involved brings it within this class of estates. 1 Taylor, Landlord & Tenant, §§ 52, 53, states the rule as follows: "An estate for life may be created either by express limitation or by a grant in general terms. If made to a man for the term of his own life, or for that of another person, he is called a tenant for life. But the estate may also be created by a general grant, without defining any specific interest, as where a grant is made to a man, or to a man and his assigns without any limitation in point of time, it will be considered as an estate for life, and for the life of the grantee only. * * * Where a grant is made, subject to be defeated by a particular event, and there is no limitation in point of time, it will be ab initio a grant of an estate for life, as much as if no such event had been contemplated. Thus, if a grant be made to a man so long as he shall inhabit a certain place, or to a woman during her widowhood, as there is no certainty that the estate will be terminated by the change of habitation or by the marriage, respectively, of the lessees, the estate is as much an estate for life, until the prescribed event takes place, as if it had been so granted in express terms."

The author's statement of the law is sustained by the other writers on the subject (4 Kent, Com. 27; 2 Blackstone, 121), and by the adjudicated cases. In Warner v. Tanner, 38 Oh. St. 118, a life estate was held to be created by a lease for a yearly rent extending during the time the lessee should continue to occupy the premises for a particular purpose. In Mickie v. Lawrence, 5 Rand. (Va.) 571, 574, the grant was to continue so long as the tenant should pay the stipulated rent. It was held a life estate. A grant "so long as the waters of the Delaware shall run" was held in Foster v. Joice, 3 Wash. C. C. 498, Fed. Cas. No. 4,974, to create a life estate. In Hurd v. Cushing, 24 Mass. 169, the premises were leased at a fixed yearly rent for the term "so long as the salt works" to be located thereon should continue in operation. It was held a life estate. In Thomas v. Thomas, 17 N. J. Eq. 356, it was held that a right given by a will to occupy at a specified annual rent certain premises so long as the devisee "may desire to occupy the same as a drug store" amounted to an estate for life. See

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also to the same effect, 16 Cyc. 614; Maverick v. Gibbs, 3 McCord (S. C.) 315; People v. Gillis, 24 Wend. 201; Roseboom v. Van Vechten, 5 Denio, 414; Ely v. Randall, 68 Minn. 177, 70 N. W. 980.

The lease in the case at bar comes within the rule of these authorities, and the trial court properly held that it vested in defendant a life estate, terminable only at his death or his removal from Albert Lea.

Judgment affirmed.

ANDREW P. OLSON v. CITY OF ALBERT LEA.[1]

February 11, 1909.

Nos. 15,940—(203).

Change of Grade—Damages.

In an action to recover damages resulting from a change in the grade of the street fronting plaintiff's property, it is *held* that on the evidence the trial court correctly charged the jury that plaintiff was entitled to recover at least the expense necessary to adjust his property to the new street.

Special Benefits—Evidence Insufficient.

Evidence *held* insufficient to justify the conclusion that the special benefits conferred by the change in the street grade equaled or exceeded the cost of restoring the property to its former condition.

Action in the district court for Freeborn county to recover $1,000 damages to a certain lot for change of street grade in front of the same. The answer was a general denial, except that the location of the lot and the existence of defendant and of a street were admitted. The case was tried before Kingsley, J., and a jury which rendered a verdict in favor of plaintiff for $81. From an order denying its motion for a new trial, defendant appealed. Affirmed.

C. E. Southwick and *H. C. Carlson,* for appellant.

T. V. Knatvold, for respondent.

[1] Reported in 119 N. W. 794.

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BROWN, J.

Action for damages alleged to have resulted to plaintiff from the change in the grade of the street fronting his property. Plaintiff had a verdict for $81, and the city appealed from an order denying its motion for a new trial.

The facts, briefly stated, are that between 1902 and 1905 defendant, through its proper officers, made certain changes in the grade of the street fronting the property owned by plaintiff, which resulted in lowering the sidewalk along his premises four feet and the center of the street in the neighborhood of four feet more. Excavations were made accordingly, and plaintiff's property left in the situation which rendered necessary either the erection of a retaining wall along the line of the sidewalk, or terracing the lot between the building and the walk, and also certain excavations for a driveway to enter the property with vehicles. It was claimed by plaintiff that the cost of this work would exceed $300, and defendant offered evidence to show that it could be done at an expense not exceeding $62.25. Plaintiff also offered evidence to the effect that the value of his premises was by the change in the street grade diminished to the amount of several hundred dollars, while defendant presented evidence for the purpose of showing that the property had in fact been enhanced in value.

The trial court correctly gave the jury the proper rule of damages, namely, the difference in value of the property before and after the improvement, but went further, and instructed them that the benefits accruing to the property from the improvement could not be offset against the cost and expense of erecting a retaining wall along the sidewalk, terracing the lot, and constructing the driveway, and that plaintiff was entitled to their verdict for at least such cost. The jury evidently acted upon this instruction, for they awarded plaintiff practically the cost of restoring the premises to their former condition in appearance and usefulness. This instruction is the principal error complained of by defendant on this appeal.

The general rule of damages in cases of this kind is the difference in the value of the property taken or damaged before and after the commission of the acts complained of, except where the cost of restoring the property to its former condition is less than the depreciated value, in which case the cost of restoration is the measure of the prop-

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erty owner's relief. Sallden v. City of Little Falls, 102 Minn. 358, 113 N. W. 884, 13 L. R. A. (N. S.) 790, 120 Am. St. 635. It may be conceded in this case, as appellant contends, that the special benefits to property resulting from an improvement of this kind may and should be offset against the damages suffered by the owner whether general or special. Winona & St. P. Ry. Co. v. Waldron, 11 Minn. 392 (515), 83 Am. Dec. 100; Lewis, Em. Dom. 218, 494, and cases cited. It may further be conceded that, where such special benefits equal or exceed the damages, the property owner is not entitled to recover, even though he would necessarily incur an expense in adjusting his property to the new conditions. From which it must be admitted that the court below, abstractly speaking, was in error in its instructions. Still the instructions were correct when applied to the facts presented in this case. We find no evidence in the record before us that would have justified the jury in finding that plaintiff's property was, without the retaining wall, driveway, and terrace, benefited or enhanced in value by the act of the city in lowering the street grade and removing the lateral support from his premises.

Nearly all the witnesses called by defendant upon this subject in effect conditioned their opinion that the property had been enhanced in value upon the erection of a retaining wall or grading the lot down to conform to the new grade and the construction of a driveway. Witness Anderson said: "If the lot was terraced off and fixed up, as I would want it, well, it would be worth quite a bit. Q. Quite a bit more? A. Yes, sir." Witness Brown thought the property had been benefited, "because the property had been increased in value by the betterment of the surroundings, this and the surrounding properties, on account of the improvements of this and the surrounding properties in that locality." But the witness gave no estimates of value, and his evidence is of little strength, for a full reading thereof leaves the impression that his opinion of benefits was based upon the general improvement of property in the particular locality. The sum and substance of Morin's testimony is that, if the retaining wall and driveway be put in, the property would be of greater value than before; but he gave no estimates and furnished no basis for computation. Gustavson's testimony was practically the same.

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We have, then, the opinion of these witnesses that plaintiff's property was benefited, providing the retaining wall and other necessary improvements to adjust it to the new conditions were made, against the conceded fact that the cost and expense of doing this work of restoration would amount at least to over $60. In this situation of the evidence the trial court was entirely justified in directing a verdict for plaintiff accordingly. The testimony of benefits was either too general, or predicated upon the further expense of restoring the property, to justify a verdict that plaintiff was not entitled at least to the expense necessary to adjust his property to the new street. Armstrong v. City of St. Paul, 30 Minn. 299, 15 N. W. 174.

This covers and disposes of all questions presented by the assignments of error which are necessary to be considered, and leads to an affirmance.

Order affirmed.

JOSEPH SWICK v. ANNA S. SHERIDAN.[1]

February 11, 1909.

Nos. 15,973—(198).

Guardian of Incompetent—Evidence.

In proceedings for the appointment of a guardian of a person alleged to be incompetent to manage his affairs, it is *held* that the evidence supports the conclusion of the trial court that the person was, by reason of the infirmities of old age, incompetent to have the charge and management of his property, and that his interests required the appointment of a guardian.

Appeal from Probate Court—Findings.

Where an appeal from probate court involves the trial of issues of fact, the trial court should make findings of fact and conclusions of law as in ordinary civil actions.

Refusal to Make Findings.

The refusal of the court to make such findings *held* not prejudicial in this particular case.

[1] Reported in 119 N. W. 791.

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Exclusion of Evidence.

Rulings of court in excluding certain non-expert opinion evidence relative to the mental condition of appellant *held* not reversible error.

A petition for the appointment of a guardian of the person and estate of Joseph Swick, an incompetent, having been granted in the probate court, Joseph Swick appealed to the district court for Hennepin county which affirmed the appointment. From an order, Holt, J., denying appellant's motion for a new trial, he appealed. Affirmed.

Wm. H. Donahue and *Charles G. Laybourn,* for appellant.

Arthur W Selover and *N. D. Bessessen,* for respondent.

BROWN, J.

Petition in due form was presented to the probate court of Hennepin county, under section 3826, R. L. 1905, for the appointment of a guardian of the person and property of Joseph Swick, on the ground that he was mentally incompetent to care for and manage his affairs. After hearing in that court a guardian was duly appointed by proper order, from which an appeal was taken to the district court. The matter came on for trial in that court, and was heard without a jury. No pleadings were made up, and the sole question litigated was the mental competency of Swick. After full hearing and trial the district court made an order affirming the order of the probate court. Thereafter Swick's counsel moved for specific findings of fact and conclusions of law, which motion the court denied. Swick then applied for a new trial on the grounds (1) that the evidence was insufficient to justify the conclusion of incompetency on the part of Swick, and (2) errors in law occurring at the trial. The assignments of error challenge certain rulings of the court in the admission and exclusion of evidence, the refusal of the court to make findings of fact and conclusions of law as in ordinary actions, and the sufficiency of the evidence to justify the conclusion that Swick was incompetent to manage his property affairs.

1. An examination of the rulings on the admission and exclusion of evidence discloses no reversible error. The nonexpert witnesses called by the appellant on the subject of his mental capacity were permitted to express, after stating the facts within their knowledge, their opinion as to the soundness of his mind, but were not permitted to say whether, in their judgment, he was likely recklessly to dispose of and waste, or

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whether he was in suitable condition to have the management of, his property. While some of the questions along this line, perhaps, might properly have been admitted, others were not based upon disclosed facts, and called for conclusions of the witnesses upon the question which the court was required to determine. The witnesses detailed fully their knowledge of the character and habits of the appellant, their business and other relations with him, and were of the opinion that his mind was clear. This was as far as they were entitled to go. 12 Am. & Eng. Enc. (2d Ed.) 488.

2. The other two questions, namely, whether findings of fact should have been made as in ordinary civil actions, and whether the evidence justifies the conclusion that appellant is incompetent to have the charge of his property and affairs, require no extended discussion. The evidence is voluminous, and lays open to view the life and character of appellant for a considerable time in the past and the immediate present. He has accumulated considerable property, is over eighty years of age, and the facts disclosed were amply sufficient to justify the trial court in concluding that his interests and the protection of his property from waste and the greed of others required the appointment of a guardian to look after his affairs. It would serve no useful purpose to discuss the evidence at length. It is sufficient to say that we have read the record with care, with the result stated.

3. Our statutes are not definite upon the question whether findings of fact should be made on the trial of all appeals from the probate court. It is clear, under section 3878, where the appeal involves the allowance or disallowance of a claim against the estate, which requires pleadings to be made up in the district court, that such should be the procedure. Turner v. Fryberger, 99 Minn. 236, 108 N. W. 1118, 109 N. W. 229. But we find no requirement for pleadings in any other case. And though section 3877 provides that such appeals, when entered on the calendar in the district court, "shall be tried and determined in the same manner as if originally commenced in such court," section 3879 provides that, when the judgment, order, or decree appealed from is sustained on the merits, the district court shall enter a judgment affirming the decision of the probate court. The first provision would seem to indicate that the usual practice and procedure applicable generally to trials in the district court should be followed, while

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the latter leaves the impression that the entry of a judgment of affirmance is all that is required. Of course, if the trial of the appeal is to proceed as though the action were originally commenced in the district court, as required by section 3877, findings are necessary in all cases where issues of fact are involved; and, though the statutes are not clear, we give effect to the provisions of section 3877, and hold that in all cases where issues of fact are presented findings of fact and conclusions of law should be made.

But in this particular case appellant was in no way prejudiced by the refusal of the court to make findings. There was but a single question of fact before the court, namely, the mental condition of appellant, and its determination was in no way confused by a complication of issues upon which a decision of the principal question depended. We take it from the memorandum of the trial court that the learned judge below was firmly convinced of the incompetency of appellant and that his interests demanded the appointment of a guardian, and, if findings of fact had been made, such would have been his conclusion. A reversal on this appeal, therefore, and remanding of the cause to the court below, with directions to make and file proper findings, would serve no purpose except delay, and that, of course, is not desired by either party.

Order affirmed.

E. E. SHARP v. M. SIMONITSCH and Another.[1]

February 11, 1909.

Nos. 15,982—(229).

Sale of Liquor License—Findings Sustained by Evidence.

The findings of fact of the trial court *held* sustained by the evidence.

Action in the district court for Clay county by the trustee in bankruptcy of Constance A. Remley, bankrupt, to recover the sum of $422, paid by one Oliver for the transfer to him of the license to sell intoxicating liquor which formerly had been held by Remley, for which

[1] Reported in 119 N. W. 790.

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defendant Simonitsch held a certificate of deposit in favor of defendant Minneapolis Brewing Company. The brewing company claimed the money as the balance of $1,000 advanced by it to pay the bankrupt's license and as the proceeds of the sale by said bankrupt of the unexpired portion of said license. The case was tried before Baxter, J., who found that neither party was entitled to any relief by the action and ordered it dismissed. From the judgment of dismissal entered pursuant to this order, plaintiff appealed. Affirmed.

E. E. Sharp and *C. R. Chapin*, for appellant.

Nye & Dosland, for respondents.

BROWN, J.

One Remley had duly obtained a license from the city of Moorhead to deal in intoxicating liquors, and had opened up an establishment for that purpose. Subsequently, and before the expiration of the term of his license, he sold his business to one Oliver. As part of the transaction Oliver paid to one Simonitsch the sum of $422, representing the value of the unexpired license, to be held by him until the settlement of a controversy between some of the parties and then paid to the person entitled to it. The money was deposited in a bank, and a certificate of deposit taken in the name of and payable to the Minneapolis Brewing Company, or its order. The matter of the transfer of the license from Remley to Oliver was thereafter submitted to the city council, and by that body, acting under section 1535, R. L. 1905, approved, and Oliver thereafter conducted the business. The sale took place in January, 1907, and in the following March Remley was duly adjudged a bankrupt, and plaintiff appointed his trustee with the usual powers. Plaintiff then brought this action against Simonitsch and the brewing company to recover the money so paid for the unexpired license, the certificate of deposit still being in the hands of Simonitsch, on the theory that it represented a part of the purchase price of the saloon and was the property of Remley, his bankrupt, and consequently passed to plaintiff as trustee upon the approval of the transfer by the city council. Defendant brewing company answered, claiming to own the money, while Simonitsch disclaimed any interest therein, and deposited the certificate in court to be disposed of as the legal rights of the parties might appear. The trial court found that

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neither party had any legal claim to the money, and the action was ordered dismissed. Judgment was entered accordingly, and plaintiff appealed.

The only question presented by the record is whether the finding of the trial court to the effect that plaintiff, as trustee of the bankrupt estate of Remley, has no right or title to the money, is sustained by the evidence. The brewing company took no appeal, and its rights are not involved. The oral argument by appellant left the impression that the court below was in error in its findings; but a full reading of the record clears the situation, and leads to the conclusion that the trial court was entirely right—at least, that the evidence is not so clearly in favor of plaintiff's contention as to justify a reversal. Remley, the bankrupt, and the person who sold out to Oliver, testified that he did not sell the unexpired license; that the brewing company had advanced him the money to pay the license fee in the first instance, and the money in question was to be returned or paid back to it; that it was so understood and agreed at the time of the sale by all the parties, including Simonitsch and Oliver; and, further, that the money was not to be paid to him at all. Simonitsch testified that the money was paid over to him, to be held until the settlement of a dispute about a lease of the premises in which the business had been conducted, pending between Oliver, the new proprietor, and the brewing company, and was then to be paid over to the brewing company. That the money was to go to the brewing company in reimbursement of its previous advances to Remley is further shown by the fact that the certificate of deposit was taken in its name. In this state of the evidence the court was not required to find that the money ever belonged to the bankrupt. It represented, it is true, the value of the unexpired license; but by the agreement it was to be returned to the brewing company as a part of the amount it had previously advanced. This was not an unlawful preference within the meaning of the bankruptcy act (Act July 1, 1898, c. 541, 30 St. 544 [U. S. Comp. St. 1901, 3418]).

Judgment affirmed.

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STATE ex rel. WAH-WE-YEA-CUMIN v. S. B. OLSON and Others.[1]

February 11, 1909.

Nos. 16,090—(274).

Quo Warranto—Application by Private Citizen.

Leave to institute and conduct proceedings in the nature of quo warranto to test the validity of proceedings had for the purpose of organizing municipal or quasi municipal corporations will not be granted at the suit of a private relator having no interest in the subject-matter distinct from that of the public. State v. Dahl, 69 Minn. 108, limited.

Same—Application by Person under Indictment.

A person under indictment by the grand jury of a county alleged to have been defectively organized is situated differently; but his interest in the question of the legality of the county organization differs from that of the public in degree only.

Information for a writ of quo warranto directed to the members of the board of county commissioners of the county of Mahnomen which set forth the facts stated in the first paragraph of the opinion and alleged that all of the proceedings touching the creation of the county of Mahnomen were void for the reason that the territory comprising the county of Norman did not have two thousand inhabitants and that the county of Mahnomen never had to exceed eleven hundred inhabitants. Application denied.

George B. Edgerton and *John P. Coleman*, for relator.

BROWN, J.

Relator, who is under indictment by the grand jury of Mahnomen county and soon to be tried thereon in the district court of that county, applies to this court for a writ of quo warranto for the purpose of inquiring into and having determined the validity of the proceedings had and taken for the organization of the county. The county was organized, if at all, under section 380, et seq., R. L. 1905. Relator alleges that the proceedings had therefor were not in compliance with the statutes, and illegal and void, in consequence of which the county has no legal or valid existence, and no term of the district court

[1] Reported in 119 N. W. 799.

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could lawfully be convened therein; hence that the indictment against him is a nullity. He also alleges that he has applied to the attorney general, and requested that officer in his official capacity to institute the proceedings, and that he has refused to do so, and, further, that he has no other method of raising the question whether the county was legally organized, and cannot do so unless he is permitted to proceed in this manner.

We have, then, squarely presented the question whether, where the attorney general refuses to interfere, proceedings in the nature of quo warranto may be instituted in this court by a private citizen, having no interest in the subject-matter of the controversy distinct from the general public, to determine the legality of the proceedings had for the purpose of creating and organizing municipal subdivisions of the state. The question has been informally presented in other applications, and disposed of without a formal opinion. We deem it advisable at this time definitely to settle the question for guidance in the future.

The question whether proceedings may be so instituted to determine the title of a person to a public office has often been before the court in one form or another, and in Barnum v. Gilman, 27 Minn. 466, 8 N. W. 375, 38 Am. 304, the right was denied. But in State v. Dahl, 69 Minn. 108, 71 N. W. 910, it was held discretionary with the court whether to grant the writ or not, where the office was filled by appointment and not by election. But neither of those cases necessarily applies to one involving the legal existence of a municipal or quasi municipal corporation.

Corporations of that character can be created only by the state, acting through the legislative department, and are brought into existence for public, and not private, purposes. They derive their franchise from the state, and are created for the better regulation and government of local affairs, and for the enforcement of laws enacted for the general welfare. Conceding for present purposes the right of a private citizen in special cases to institute proceedings to test the right of another to hold an office in such corporation, and for which the applicant for the writ is not a claimant, when he goes further with his application, and seeks to attack the legal existence of the corporation and its right to exercise its public functions, a right derived wholly from the state, he encroaches upon a domain in which his interests are not distinct

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from those of the other citizens, and he should not be heard. In such a case the right to institute an inquiry into the legality of the acts of the corporation should be confined to the law officer of the state, the attorney general. Such was the view taken in State v. Tracy, 48 Minn. 497, 51 N. W. 613, and is sustained by the authorities generally. King v. Bond, 2 T. R. 767; State v. Vickers, 51 N. J. L. 180, 17 Atl. 153, 14 Am. St. 675; Ewing v. State, 81 Tex. 172, 16 S. W. 872; State v. Town, 129 Mo. App. 138, 108 S. W. 117; State v. Seymour, 69 N. J. L. 606, 55 Atl. 91; State v. Town Council, 30 Ala. 66; Henry v. Steele, 28 Ark. 455; State v. Village of Kent, 96 Minn. 255, 104 N. W. 948, 1 L. R. A. (N. S.) 826.

We had the question before us recently in State v. McDonald, 101 Minn. 349, 112 N. W. 278, where it was referred to briefly. In that case a similar application was made, but to the district court, to test the validity of the organization of Koochiching county, and we held, conceding, under the rule of the Dahl case, that private suit might be maintained in the discretion of the court, that the district court did not abuse its discretion in denying the right to relator in that case. But we did not intend to be understood as laying down a general rule on the subject by the decision there made, and it is to be noted that the syllabus in that case is somewhat broader than warranted by the opinion. The question ought at this time to be definitely settled and put at rest, and to that end we hold, in harmony with what seems the trend of judicial opinion, that leave to conduct quo warranto proceedings to test the legality of the organization of municipal or quasi municipal corporations will not be granted at the instance of private relators having no interest in the subject-matter distinct from the public. The Dahl case should be limited to facts like those there before the court.

The reasons for the rule which we here apply are well stated by Judge Vanderburgh in the Tracy case, supra. And we may add to what was said in that case that to permit persons, with some special interest to protect, in this manner to question the legality of the organization of cities, villages, or counties of the state would in effect vest in them prerogatives belonging peculiarly to the state, the creative power, and open an unnecessary field of litigation, founded in most instances in selfish motives or disappointed aspirations for public favors.

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Again, in this particular case the county challenged has been in existence and exercising the powers conferred upon county organizations for two years. It has fully equipped itself for the discharge of all its functions and has been recognized by the legislature as an existing county organization. By chapter 405, p. 561, Laws 1907, an appropriation was made to it for the purpose of improving roads and highways within its boundaries. It has frequently been held that a recognition of a municipal corporation by legislative act bars the right of the state subsequently to question the sufficiency of the organization. State v. Village of Harris, 102 Minn. 340, 113 N. W. 887, 13 L. R. A. (N. S.) 533; State v. School District, 85 Minn. 230, 88 N. W. 751; State v. Leatherman, 38 Ark. 81; Jameson v. People, 16 Ill. 257, 63 Am. Dec. 304; State v. Town, 116 Mo. 582, 22 S. W. 888. But, whether the state may be absolutely barred or estopped by such legislative recognition or not, the fact of such recognition manifestly ought to preclude the right of private suit. In the case of State v. School District, supra, the state had loaned the school district money, and we held that it could not thereafter, even at the suit of the attorney general, question the legality of the organization of the district. There is probably no distinction in point of substance between a loan of money to such a corporation and an act of the legislature appropriating money to aid in the management of its corporate affairs.

Though the information before us is directed to the board of county commissioners, the purpose of the proceedings is to assail the county organization, and, unless relator has some interest in the matter distinct from the public, he cannot be heard. The fact that he is under indictment by the grand jury of the alleged defectively organized county does not vest in him any distinct or special right within the meaning of the law. His situation is different; but his interest in the question whether the county was legally organized is identical with that of other citizens, varying only in degree. He occupies no better position than a general taxpayer or a legal voter who pays no taxes. It might with equal force be claimed that a nonresident property owner occupies a position different from those residing in the county, or that a legal voter of the county, who owns no property and pays no taxes, has an interest distinct from the voters of the county who do own property and pay taxes.

For the reasons stated, the application of relator is denied.

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AMERICAN BRIDGE COMPANY OF NEW YORK v. AMERICAN DISTRICT STEAM COMPANY and Others.[1]

February 19, 1909.

Nos. 15,848—(168).

Contract—Performance in Reasonable Time—Parol Evidence.

Action to recover the balance due upon a contract for the erection by the plaintiff of the structural steel in the defendant's power house, and for extras. The answer admitted the contract, and alleged as a counterclaim damages sustained by the defendant by the delay of the plaintiff in performing the contract. *Held:*

1. Where issues of fact are tried by the court without a jury, the admission of incompetent or immaterial evidence is not reversible error if the competent and relevant evidence is sufficient to support the findings of fact, and there is no reasonable ground for inferring from the nature of the improper evidence that it was or might have been a material factor in the court's determination of the facts.

2. Where a written contract is silent as to the time for performance, the law implies that it must be performed within a reasonable time, and parol evidence is not admissible to vary the construction of the contract so implied by showing an understanding of the parties at the time it was made as to what would be a reasonable time.

3. Parol evidence, however, of facts known to the parties at the time the contract was made, which are pleaded, is competent and relevant upon the trial of an issue of what, in view of all the circumstances, was a reasonable time for performance, and also on the trial of the question as to what damages were reasonably within the contemplation of the parties.

4. The evidence sustains the findings of fact of the trial court, and no reversible errors were made in ruling upon the admission of evidence.

Action in the district court for Ramsey county to foreclose a mechanic's lien for $16,013.59. The answer set up a counterclaim and prayed for judgment of $22,977.82. The facts are stated in the opinion. The case was tried before Brill, J., who found in favor of plaintiff for the sum of $4,033.02. From a judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

[1] Reported in 119 N. W. 783.

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Frank B. Kellogg, C. A. Severance, and *Robert E. Olds,* for appellant.

Thomas McDermott and *James D. Denegre,* for respondents.

START, C. J.

The appellant, hereinafter referred to as the Bridge Company, and the respondent, hereinafter referred to as the Heating Company, on May 5, 1905, entered into a contract by which the Bridge Company agreed to furnish the materials and labor for and to erect the structural steel work upon the power house in the city of St. Paul of the Heating Company for the sum of $82,500. The Bridge Company brought this action in the district court of the county of Ramsey to foreclose a mechanic's lien upon the power house and the lots upon which it was erected pursuant to such contract.

The complaint alleged that the Bridge Company at the request of the Heating Company furnished extras, not included in the original contract, which were used in the completion of the power house, and were of the reasonable value of $3,262.11, making, with the contract price, the total value of the materials and labor so furnished $85,762.11, of which $69,748.52 had been paid. Judgment for $16,013.59 and the enforcement of the lien were demanded. The answer admitted the making of the contract and the furnishing of the extras of the value of $1,997.42, but other than this denied the claim for extras. The answer also alleged a counterclaim for damages in the sum of $22,977.82 on account of the unreasonable delay of the Bridge Company in completing its contract. The counterclaim was denied by the reply.

The issues were tried by the court without a jury. The ultimate findings of fact and conclusions of law of the trial court were to the effect that the Bridge Company furnished extras in the construction of the power house of the value of $1,997.42, and that all other claims for extras were not sustained by the evidence; that there remained unpaid upon the contract and for such extras the sum of $14,748.90; that the Heating Company sustained damages by reason of the delay of the Bridge Company in completing the contract within a reasonable time in the sum of $10,715.88; and, further, that the Bridge Company was entitled to judgment against the Heating Company for the sum

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of $4,033.02. Judgment was so entered, from which the Bridge Company appealed.

The assignments of error raise two general questions: (a) Are the findings of fact sustained by the evidence? (b) Did the trial court err in its rulings as to the admission of evidence?

1. The first and the most important question to be considered is whether the findings are sustained by the evidence. The court found that, making allowance for all necessary delays by the Bridge Company, if it had prosecuted the execution of its contract with reasonable diligence, it could and would have completed the work on November 30, 1905, but it did not substantially complete the same until the summer of 1906; and, further, that by reason of such unreasonable delay the Heating Company necessarily paid for the erection of a temporary smokestack the sum of $386.58, for the rent of other boilers $1,494, for more coal for generating steam than would otherwise have been necessary $7,764, for rent of office $150, for covering opening in economizer floor $7.66, for salary of constructing engineer to oversee the work of erecting the power house for four months longer than would have been otherwise necessary $900, and for repair of broken wall caused by the negligence of the Bridge Company's servants $13.-64; and that the Heating Company had sustained damages by such delay in the sum of $10,715.88. The contract between the parties stipulated that a designated portion of the material should be delivered by the Bridge Company by June 15, 1905, and that it should immediately commence to erect same, and deliver and erect the balance of the steel without delay thereafter, unless it should be delayed by strikes or other causes beyond its reasonable control. The contract did not designate any definite time for the completion of the work. Hence the Bridge Company undertook to complete it within a reasonable time. Whether it did so was a question of fact, to be determined by a consideration of all of the circumstances of the case as disclosed by the evidence. Roberts v. Mazeppa Mill Co., 30 Minn. 413, 15 N. W. 680.

The evidence is voluminous, and it is not our purpose to discuss it as it would serve no practical purpose. We have, however, attentively considered the evidence aided by the briefs of respective counsel, and have reached the conclusion that, while there were de-

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lays in the execution of the contract by the Bridge Company for which it was not responsible, nevertheless the finding of the trial court that the Bridge Company by reasonable diligence could and would have completed its contract by November 30, 1905, and that the delay thereafter to complete it was unreasonable, is fairly sustained by the evidence.

The rule as to the damages which the Heating Company were entitled to recover for the breach of the contract is this: They must be such as either arise naturally; that is, in the usual course of things from the breach itself or such as may reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of the breach. Paine & Co. v. Sherwood & Sewall, 19 Minn. 270 (315). The correctness of the rule is not denied, but it is earnestly contended by the counsel for the Bridge Company that the several items of damage allowed by the trial court are remote and conjectural. Therefore their allowance is not justified by the evidence.

The record discloses evidence tending to show that the Bridge Company was advised at or before the time the contract between the parties was executed that the work called for by the contract was for the erection of an essential part of the Heating Company's heating plant; that it held a franchise from the city of St. Paul to conduct a heating business from its plant, which required it to have its plant ready by October 1, 1905; that it had made contracts with consumers to supply them with heat for the season of 1905 and 1906, and that it was expected that the plant would be so far completed that steam could be furnished therefrom for such heating season; and, further, that the Bridge Company then knew the nature and purpose of the heating plant and the Heating Company's obligation to so furnish steam to consumers and other facts relevant to the question of what damages for a breach of the contract it would be reasonable to suppose were contemplated by the parties thereto. We are of the opinion that the evidence, if it was competent, was sufficient to justify a finding of the trial court that damages of the character of those allowed by the court must have been contemplated by the parties in case of a breach of the contract, and that the Heating Company sustained damages by such breach to the amount of the several items allowed by the court.

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The evidence also sustains the findings of the trial court as to the disallowance of a portion of the Bridge Company's claims for extras.

2. This brings us to the question whether reversible error was committed by the trial court in its rulings on the admission of evidence. In this connection we must keep in mind the rule that, where issues of fact are tried by the court without a jury, the admission of incompetent or immaterial evidence is not reversible error if the competent and relevant evidence is sufficient to support the findings of fact, and there is no reasonable ground for inferring from the nature of the improper evidence that it was or might have been a material factor in the court's determination of the facts. Mankato Mills Co. v. Willard, 94 Minn. 160, 102 N. W. 202.

Certain ordinances of the city of St. Paul relating to the Heating Company's franchise and the limitations thereof were received in evidence over the objections of the Bridge Company. The ruling is here assigned as error on the ground that the ordinances were incompetent and immaterial. If this were conceded, the ruling would not be reversible error for the record does not disclose any reasonable ground for inferring that such evidence was a material factor in the court's determination of the facts. We are, however, of the opinion that there was no error, reversible or otherwise, in receiving the evidence. The ordinances were not offered or received in evidence for the purpose of showing an understanding of the parties to the contract as to what would be a reasonable time for the performance of the contract, as counsel seems to claim. They were not admissible for such purpose.

Where a written contract is silent as to the time for performance, the law implies that it must be performed within a reasonable time, and parol evidence is not admissible to vary the construction of the contract so implied by showing an understanding of the parties at the time it was made as to what would be a reasonable time for performance. But parol evidence of material facts known to the parties at the time the contract was made, which are pleaded, is competent and relevant upon the trial of an issue of what, in view of all the circumstances, was a reasonable time for performance. Such evidence is also admissible on the trial of the question as to what damages were reasonably within the contemplation of the parties. Roberts v. Mazep-

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pa Mill Co., 30 Minn. 413, 15 N. W. 680; Stone v. Harmon, 31 Minn. 512, 19 N. W. 88; Palmer v. Breen, 34 Minn. 39, 24 N. W. 322; Liljengren Furniture & Lumber Co. v. Mead, 42 Minn. 420, 44 N. W. 306; Day v. Gravel, 72 Minn. 159–163, 75 N. W. 1.

The ordinances and evidence of conversations between the agents of the respective parties prior to the making of the contract were admissible within the rule stated, either on the issue as to reasonable time for performance or on the question of what damages were reasonably within the contemplation of the parties. It is true that damages similar to those allowed in this case were disallowed in the case of Liljengren Furniture & Lumber Co. v. Mead, supra, because no extrinsic facts were alleged in that case showing any proximate relation between the breach of the contract and the damages claimed, as was done in this case.

We have examined the other rulings of the court on the admission of evidence complained of, and find no reversible error therein.

Judgment affirmed.

EDWARD C. TUTTLE v. CASSIUS M. BUCK.[1]

February 19, 1909.

Nos. 15,915—(82).

Competiton in Business—Complaint Good Against Demurrer.

A complaint which states, in substance, that the defendant, a banker and man of wealth and influence in the community, maliciously established a barber shop, employed a barber to carry on the business, and used his personal influence to attract customers from the plaintiff's barber shop, not for the purpose of serving any legitimate purpose of his own, but for the sole purpose of maliciously injuring the plaintiff, whereby the plaintiff's business was ruined, states a cause of action.

Action in the district court for Wright county to recover $10,000 damages. Defendant demurred to the complaint on the ground it did not state a cause of action. From an order, Buckham, J., overruling the demurrer, defendant appealed. Affirmed.

[1] Reported in 119 N. W. 946.

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This appeal was from an order overruling a general demurrer to a complaint in which the plaintiff alleged:

That for more than ten years last past he has been and still is a barber by trade, and engaged in business as such in the village of Howard Lake, Minnesota, where he resides, owning and operating a shop for the purpose of his said trade. That until the injury hereinafter complained of his said business was prosperous, and plaintiff was enabled thereby to comfortably maintain himself and family out of the income and profits thereof, and also to save a considerable sum per annum, to wit, about $800. That the defendant, during the period of about twelve months last past, has wrongfully, unlawfully, and maliciously endeavored to destroy plaintiff's said business, and compel plaintiff to abandon the same. That to that end he has persistently and systematically sought, by false and malicious reports and accusations of and concerning the plaintiff, by personally soliciting and urging plaintiff's patrons no longer to employ plaintiff, by threats of his personal displeasure, and by various other unlawful means and devices, to induce, and has thereby induced, many of said patrons to withhold from plaintiff the employment by them formerly given. That defendant is possessed of large means, and is engaged in the business of a banker in said village of Howard Lake, at Dassel, Minnesota, and at divers other places, and is nowise interested in the occupation of a barber; yet in the pursuance of the wicked, malicious, and unlawful purpose aforesaid, and for the sole and only purpose of injuring the trade of the plaintiff, and of accomplishing his purpose and threats of ruining the plaintiff's said business and driving him out of said village, the defendant fitted up and furnished a barber shop in said village for conducting the trade of barbering. That failing to induce any barber to occupy said shop on his own account, though offered at nominal rental, said defendant, with the wrongful and malicious purpose aforesaid, and not otherwise, has during the time herein stated hired two barbers in succession for a stated salary, paid by him, to occupy said shop, and to serve so many of plaintiff's patrons as said defendant has been or may be able by the means aforesaid to direct from plaintiff's shop. That at the present time a barber so employed and paid by the defendant is occupying and nominally conducting the shop thus fitted and furnished by the defendant, without paying any

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rent therefor, and under an agreement with defendant whereby the income of said shop is required to be paid to defendant, and is so paid in partial return for his wages. That all of said things were and are done by defendant with the sole design of injuring the plaintiff, and of destroying his said business, and not for the purpose of serving any legitimate interest of his own. That by reason of the great wealth and prominence of the defendant, and the personal and financial influence consequent thereon, he has by the means aforesaid, and through other unlawful means and devices by him employed, materially injured the business of the plaintiff, has largely reduced the income and profits thereof, and intends and threatens to destroy the same altogether, to plaintiff's damage in the sum of $10,000.

Hall & Kolliner, for appellant.

A general allegation in a complaint is of no avail as against the specific facts pleaded therein. Gowan v. Bensel, 53 Minn. 46; Carlson v. Presbyterian Board of Relief, 67 Minn. 436. Competition will not be restricted. Chambers v. Baldwin, 91 Ky. 121; Doremus v. Hennessy, 176 Ill. 608. Defendant's act was "damnum absque injuria." Auburn v. Douglass, 9 N. Y. 444; Bohn Mnfg. Co. v. Hollis, 54 Minn. 233; Ertz v. Produce Exchange, 79 Minn. 143. The motive of competition is immaterial. South Royalton v. Suffolk, 27 Vt. 505; Wilson v. Berg, 88 Pa. St. 167; Kiff v. Youmans, 86 N. Y. 324; Boyson v. Thorn, 98 Cal. 578; Glencoe v. Hudson, 138 Mo. 439; Transportation Co. v. Standard Oil Co., 50 W. Va. 611.

F. E. Latham and *Daniel Fish,* for respondent.

The rule of fair play is more and more enforced by the courts. Stillwater Water Co. v. Farmer, 89 Minn. 58, and 92 Minn. 230; Barclay v. Abraham, 121 Iowa, 619; Burke v. Smith, 69 Mich. 380; Kirkwood v. Finegan, 95 Mich. 543; Passaic v. Ely, 62 L. R. A. 673, Note.

ELLIOTT, J. (after stating the facts as above).

It has been said that the law deals only with externals, and that a lawful act cannot be made the foundation of an action because it was done with an evil motive. In Allen v. Flood, [1898] A. C. 1, 151, Lord Watson said that, except with regard to crimes, the law does not

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take into account motives as constituting an element of civil wrong. In Mayor v. Pickles, [1895] A. C. 587, Lord Halsbury stated that if the act was lawful, "however ill the motive might be, he had a right to do it." In Raycroft v. Tayntor, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. 882, the court said that, "when one exercises a legal right only, the motive which actuates him is immaterial." In Jenkins v. Fowler, 24 Pa. St. 308, Mr. Justice Black said that "malicious motives make a bad act worse, but they cannot make that wrong which, in its own essence, is lawful." This language was quoted in Bohn Mnfg. Co. v. Hollis, 54 Minn. 223, 233, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. 319, and in substance in Ertz v. Produce Exchange, 79 Minn. 140, 143, 81 N. W. 737, 48 L. R. A. 90, 79 Am. St. 433. See also 2 Cooley, Torts (3d Ed.) 1505; Auburn v. Douglass, 9 N. Y. 444.

Such generalizations are of little value in determining concrete cases. They may state the truth, but not the whole truth. Each word and phrase used therein may require definition and limitation. Thus, before we can apply Judge Black's language to a particular case, we must determine what act is "in its own essence lawful." What did Lord Halsbury mean by the words "lawful act"? What is meant by "exercising a legal right"? It is not at all correct to say that the motive with which an act is done is always immaterial, providing the act itself is not unlawful. Numerous illustrations of the contrary will be found in the civil as well as the criminal law.

We do not intend to enter upon an elaborate discussion of the subject, or become entangled in the subtleties connected with the words "malice" and "malicious." We are not able to accept without limitations the doctrine above referred to, but at this time content ourselves with a brief reference to some general principles.

It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin, and seeks to establish doctrines and rules for the determination, protection, and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and

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not a mere abstraction, it must gradually adapt itself to changed conditions. Necessarily its form and substance have been greatly affected by prevalent economic theories.

For generations there has been a practical agreement upon the proposition that competition in trade and business is desirable, and this idea has found expression in the decisions of the courts as well as in statutes. But it has led to grievous and manifold wrongs to individuals, and many courts have manifested an earnest desire to protect the individual from the evils which result from unrestrained business competition. The problem has been to so adjust matters as to preserve the principle of competition and yet guard against its abuse to the unnecessary injury to the individual. So the principle that a man may use his own property according to his own needs and desires, while true in the abstract, is subject to many limitations in the concrete. Men cannot always, in civilized society, be allowed to use their own property as their interests or desires may dictate without reference to the fact that they have neighbors whose rights are as sacred as their own. The existence and well-being of society require that each and every person shall conduct himself consistently with the fact that he is a social and reasonable person. The purpose for which a man is using his own property may thus sometimes determine his rights, and applications of this idea are found in Stillwater Water Co. v. Farmer, 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. 541, Id., 92 Minn. 230, 99 N. W. 882, and Barclay v. Abraham, 121 Iowa, 619, 96 N. W. 1080, 64 L. R. A. 255, 100 Am. St. 365.

Many of the restrictions which should be recognized and enforced result from a tacit recognition of principles which are not often stated in the decisions in express terms. Sir Frederick Pollock notes that not many years ago it was difficult to find any definite authority for stating as a general proposition of English law that it is wrong to do a wilful wrong to one's neighbor without lawful justification or excuse. But neither is there any express authority for the general proposition that men must perform their contracts. Both principles, in this generality of form and conception, are modern and there was a time when neither was true. After developing the idea that law begins, not with authentic general principles, but with the enumeration of particular remedies, the learned writer continues: "If there exists, then, a posi-

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tive duty to avoid harm, much more must there exist the negative duty of not doing wilful harm, subject, as all general duties must be subject, to the necessary exceptions. The three main heads of duty with which the law of torts is concerned, namely, to abstain from wilful injury, to respect the property of others, and to use due diligence to avoid causing harm to others, are all alike of a comprehensive nature." Pollock, Torts, (8th Ed.) p. 21. He then quotes with approval the statement of Lord Bowen that "at common law there was a cause of action whenever one person did damage to another, wilfully and intentionally, without just cause or excuse."

In Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. 330, Mr. Justice Hammond said: "It is said also that, where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. One form of this statement appears in the first headnote in Allen v. Flood, as reported in [1898] A. C. 1, as follows: 'An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action.' If the meaning of this and similar expressions is that where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either logically or legally accurate."

Similar language was used by Mr. Justice Wells in Walker v. Cronin, 107 Mass. 555; by Lord Coleridge in Mogul Steamship Co. v. McGregor, 21 Q. B. Div. 544–553; by Lord Justice Bowen in the same case, 23 Q. B. Div. 593; by Mr. Justice Holmes in Aikens v. Wisconsin, 195 U. S. 194, 204, 25 Sup. Ct. 3, 49 L. Ed. 154; by Chief Justice McSherry in Klingel v. Sharp, 104 Md. 233, 64 Atl. 1029, 7 L. R. A. (N. S.) 976, 118 Am. St. 399; and by Judge Sanborn in his dissenting opinion in Passaic Print Works v. Ely & Walker Dry Goods Co., 105 Fed. 163, 44 C. C. A. 426, 62 L. R. A. 673. Numerous cases will be found referred to in the note to this case in 62 L. R. A. 673, and in an article in 18 Harvard Law Rev. 411.

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It is freely conceded that there are many decisions contrary to this view; but, when carried to the extent contended for by the appellant, we think they are unsafe, unsound, and illy adapted to modern conditions. To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, (not for the sake of profit to himself,) but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort. In such a case he would not be exercising his legal right, or doing an act which can be judged separately from the motive which actuated him. To call such conduct competition is a perversion of terms. It is simply the application of force without legal justification, which in its moral quality may be no better than highway robbery.

Nevertheless, in the opinion of the writer this complaint is insufficient. It is not claimed that it states a cause of action for slander. No question of conspiracy or combination is involved. Stripped of the adjectives and the statement that what was done was for the sole purpose of injuring the plaintiff, and not for the purpose of serving a legitimate purpose of the defendant, the complaint states facts which in themselves amount only to an ordinary everyday business transaction. There is no allegation that the defendant was intentionally running the business at a financial loss to himself, or that after driving the plaintiff out of business the defendant closed up or intended to close up his shop. From all that appears from the complaint he may have opened the barber shop, energetically sought business from his acquaintances and the customers of the plaintiff, and as a result of his enterprise and command of capital obtained it, with the result that the plaintiff, from want of capital, acquaintance, or enterprise, was unable to stand the competition and was thus driven out of business. The facts thus alleged do not, in my opinion, in themselves, without reference to the way in which they are characterized by the pleader, tend to show a malicious and wanton wrong to the plaintiff.

A majority of the justices, however, are of the opinion that, on the

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principle declared in the foregoing opinion, the complaint states a cause of action, and the order is therefore affirmed.

Affirmed.

JAGGARD, J., dissents.

FRANK W. SHAW and Others v. MILTON R. STAIGHT.[1]

February 19, 1909.

Nos. 15,919—(156)

Issue of Stock—Partial Payment.

Shares of stock in a corporation issued and sold as full paid stock, but for a sum less than its par value, are not void, but the agreement between the holder and the corporation that it shall be considered and treated as paid in full is voidable as to the creditors of the corporation.

Action by Stockholder.

The holder of such stock, though he paid therefor less than the par value, may maintain an action to protect such rights as accrue to him as a stockholder.

Same—Refusal of Officers to Sue.

A request to the managing officers of a corporation to institute an action to set aside and cancel a fraudulent issue of corporate stock, and their refusal, is all that is necessary to enable an individual stockholder to maintain the suit.

Same.

It is not necessary that he go further, and request other stockholders to commence the action.

Findings Sustained by Evidence.

Evidence *held* to justify the findings of the trial court to the effect that an issue of twenty eight thousand shares of the stock of defendant corporation was fraudulent and void.

Same—Knowledge of Fraud.

And that defendant Staight, the holder of a part of the stock so issued, had full knowledge of the facts constituting the fraud, and was not a good-faith holder thereof.

[1] Reported in 119 N. W. 951.

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Action in the district court for Hennepin county by the executors of the will of Winfield S. Laton, deceased, substituted for their testator, and other stockholders of the Pacific Coast & Norway Packing Company to have four thousand shares of stock in that corporation declared null and void. A demurrer to the complaint by defendant Staight was overruled, Simpson, J. Staight then answered. The corporation did not answer. Defendant Staight's motion for judgment on the pleadings was denied, Frederick V. Brown, J. The case was tried before Dickinson, J., who also denied Staight's motion for judgment on the pleadings, found for plaintiffs and ordered that the stock be canceled. From a judgment entered pursuant to the order, defendant Staight appealed. Affirmed.

H. D. Irwin, for appellant.

Plaintiffs' cause of action is based upon and arises out of contracts or transactions, to which they were parties, which were illegal, fraudulent and against public policy; hence they are not entitled to equitable relief. They do not come into court with clean hands. Unckles v. Colgate, 148 N. Y. 529; Pomeroy, Eq. Jur. §§ 397, 398, 401, 402. The contracts or transactions by which plaintiffs acquired their stock were prohibited by statute, against public policy and immoral. G. S. 1894, § 3415; See R. L. 1905, § 2878. See Wallace v. Carpenter Ele. Heating Mnfg. Co., 70 Minn. 321; Rogers v. Gross, 67 Minn. 224; Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28; Sturges v. Stetson, 1 Biss. 246; Gamble v. Queens County, 123 N. Y. 91; Zelaya v. Meyer, 28 N. Y. St. 759; Knowlton v. Congress, 57 N. Y. 518; Kimball v. New England, 69 N. H. 485; Oliphant v. Woodburn, 63 Iowa, 332; Spring Co. v. Knowlton, 103 U. S. 49. See G. S. 1894, § 6762; State v. Great Northern Ry. Co., 100 Minn. 445, 474.

Total want of consideration being the sole issue, on plaintiffs' theory of the law, consideration for the stock was proved—and no other issue was tried by consent or without objection.

The issuance of this stock and the contract by which it was issued was ratified and acquiesced in by the corporation and the stockholders. The stockholders in January, 1902, expressly recognized Kildall's ownership of ten thousand shares of this stock, and took cognizance of contract by which it was issued by appointing a trustee to vote it as provided therein.

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Benton, Molyneaux & Morley, for respondents.

BROWN, J.

The facts in this case are as follows: The defendant Pacific Coast & Norway Packing Company is a corporation duly created and existing under the laws of this state. It was incorporated in May, 1900, for manufacturing purposes, with authority to prepare, sell, and dispose of all kinds of canned goods, pickles, smoked and dried herring, fish, and other sea foods, and to acquire, own, and hold all property necessary to the conduct of its business. Its capital stock was placed at $1,000,000, divided into one hundred thousand shares of a par value of ten dollars each. At the first meeting of the board of directors, the sale of fifty thousand shares of stock was authorized at one dollar per share. Winfield S. Laton purchased and became the owner of three hundred shares at that price. Plaintiffs Nellie and Fannie Cooley also became the owners of one hundred shares; each paying therefor the same consideration. Said plaintiffs Cooley have at all times since been the owners and holders of the stock so purchased by them.

Subsequent to the commencement of the action, Laton died, and plaintiffs Shaw and Gillerson were substituted as parties to the action; they being the executors of his last will and testament. Laton, or his estate, has at all times since the issuance of the stock to him continued the owner thereof.

In June, 1900, one Joseph Kildall, representing the Kildall Fish Company, a copartnership composed of himself, his father, and two brothers, made to the board of directors of defendant packing company the following proposition for the sale of certain rights and properties then claimed to be held and owned by the copartnership, namely:

"Minneapolis, Minnesota, June 2, 1900.

"Pacific Coast & Norway Packing Company,
City.

"Gentlemen:

"We hereby offer to sell to you our certain fishing outfit, consisting principally of fishing nets, lines, floats, boats, and articles now stored in our storehouse at Marietta, Washington.

"This fishing outfit originally cost us about $1,800.00. Also all our

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right and title to certain fishing and packing locations which we have explored and decided upon in the territory of Alaska main location at Killisno, between Sitka and Juneau, which we value at twenty thousand dollars. These we agree to convey to you in consideration of twenty-eight thousand shares of the capital stock of your company, to be issued to Joseph Kildall.

"If this proposition is accepted then, in consideration of its acceptance, we collectively and individually agree to give to your company the benefit of our knowledge and experience in the fishing and packing business, and give to your company our best advice in its affairs, and Joseph Kildall to be bound to generally supervise the affairs of your company for a period of two years without further compensation.

"It is further understood that if the services of P. C. Kildall and Michael Kildall should be required by your company in the fishing and packing business, they will hold themselves in readiness to serve your company for compensation to be agreed upon by the board of directors, covering the time actually engaged.

"It is further understood that in addition to the above, Joseph Kildall in the event this proposition is accepted, binds himself to continue the management of the company's affairs for an additional period of three years at a compensation to be agreed upon by the board of directors, and none of the Kildalls here mentioned shall exact or demand anything more than a fair compensation.

"Respectfully submitted,

"Kildall Fish Company.
"Joseph Kildall."

Kildall was a promoter of the packing company and one of the incorporators, and at the time of the submission of this proposition a director, and acted as secretary of the meeting at which it was accepted. So that he acted in the dual capacity of seller and buyer, selling for his copartnership and participating in the purchase as one of the directors of the corporation. The proposition was accepted, and the twenty eight thousand shares of stock, the purchase price of the property therein named, subsequently issued to Kildall. By the terms of the acceptance, ten thousand of the shares were, to prevent the Kildalls from controlling the corporation, transferred to a trustee, to be held and controlled by him for the term of five years, and then turned

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over to Kildall. But this fact is unimportant. Thereafter Kildall sold and transferred four thousand shares of the stock issued to him to defendant Staight, who is now the owner and holder thereof.

In September, 1903, plaintiffs, as stockholders, on the claim that the transaction by which the corporation accepted the Kildall proposition was a fraud and that no consideration ever passed from Kildall to the corporation, demanded that the officers thereof bring an action to set the same aside, and to cancel and annul the stock so issued. The officers refused to comply with the demand, and this action followed, by which plaintiffs, as stockholders, seek to avoid the transaction on the ground of alleged fraud and to cancel the stock held by Staight. The trial court found the facts substantially as stated; that the transaction was fraudulent; that the Kildall Fish Company had no fishing locations on the Pacific Coast or elsewhere, and conveyed none to the corporation in consideration of the stock issued to Kildall; that the fishing tackle and other property offered to be transferred to the corporation by the written proposition heretofore set out was old, worn out, and of no value whatever; and, further, that the corporation received no consideration from the issuance of this stock save the value of Kildall's services as secretary for the corporation for two years at $300 per year. The court also found that defendant Staight had full knowledge of all the facts and of the fact that Kildall had no fishing locations to sell or convey to the corporation; that the corporation never acquired such rights from the Kildall copartnership, also that the four thousand shares of the stock issued to Kildall and transferred to Staight were transferred to him wholly without consideration. The court also found that plaintiffs herein knew nothing of the merits of the transaction until about the time of the commencement of the action. Judgment was ordered and entered canceling and annulling the stock so held by Staight, and he appealed.

Several questions are presented by the assignments of error which will be considered in their order. Three of them, viz., that the complaint fails to state a cause of action, that the evidence is insufficient to justify the findings of fact, and that the findings of fact do not justify the conclusions of law, require no extended mention. Though the complaint is not so full and complete as perhaps it might have been made, it is sufficient in all essential respects, and sets forth facts en-

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titling plaintiffs to the relief prayed for. With respect to the sufficiency of the evidence to sustain the findings, we have only to say that the record has been read with care, with the result that in our opinion all the findings of fact are fully supported by competent evidence. Whether the conclusions of law are supported by the findings of fact depends upon the result to be arrived at respecting the several contentions of defendant presently to be considered. That the proper judgment was ordered by the trial court we have no doubt. We come then to the specific contentions of defendant.

1. Defendant contends that plaintiffs cannot maintain the action, for the reason that the stock held by them is void, and they do not come into court with clean hands. This is based upon the fact, about which there is no controversy, that plaintiffs purchased and paid for the stock held by them at the rate of one dollar per share, the par value being ten dollars, with the understanding and agreement that the amount so paid should be in full and entitle them to certificates of fully paid stock. Fully paid stock was accordingly issued to them. The point is that this agreement was in violation of section 2878, R. L. 1905, prohibiting the issuance of corporate stock for less than its par value; and it is urged that the transaction was void, that plaintiffs are holders of stock illegally issued, and therefore without standing in a court of equity. The contention is not sound. It appears from the record that the stock of the corporation was divided into one hundred thousand shares of the par value of ten dollars. But at the time of the organization the stock was placed on the market at one dollar per share, at which price plaintiffs purchased the shares held by them. This was probably a violation of the statute above referred to, but the stock so issued was not necessarily so tainted with illegality as to render it void nor as fraudulent in the hands of the holders. The agreement that it should be fully paid stock was undoubtedly voidable and could be so adjudged at the suit of creditors, but until set aside and declared void at their instance it is valid, not only between the corporation and stockholders, but as between the several stockholders as well. Olson v. State Bank, 67 Minn. 267, 69 N. W. 904; Dunn v. State Bank, 59 Minn. 221, 61 N. W. 27.

As remarked in the case of Barcus v. Gates, 89 Fed. 783, 32 C. C. A. 337, it would be a new doctrine to hold that because a stockholder

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has bought stock fror a corporation at a price less than its par value, under an agreement that it shall be treated as paid in full, his stock is void, and he without standing in court to protect rights accruing the stockholders by reason of th misconduct of the corporation or its managing officers. Such a doctrine would, as intimated by Judge Mitchell in the Olson case, supra, convert the statute prohibiting such an issue of stock into a shield in the hands of the stockholders to defraud creditors who might trust the corporation. If the stock so issued is void, then, in proceedings by creditors to compel the holders thereof to pay into the corporation the unpaid value, the fact that the stock was void would be a complete defense, and relieve them from any and all obligations to creditors. The true doctrine in such cases is that the stock is not void, but the holder thereof may be compelled at the suit of creditors to pay into the corporation the full par value. The stock is valid, but the agreement that it shall be considered as paid in full is voidable. The authorities sustaining this view may be found collected in a note to Easton v. American, 8 L. R. A. (N. S.) 271, and Security Trust Co. v. Ford, 8 L. R. A. (N. S.) 263. The Minnesota cases cited by appellant do not sustain the position that such stock is void, or tainted with illegality to such an extent as to deprive the stockholder of the rights incident to his relation to the corporation. Wallace v. Carpenter Ele. Heating Mnfg. Co., 70 Minn. 321, 73 N. W. 189, 68 Am. St. 530, and Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28, 67 N. W. 652, involved rights of creditors, while Rogers v. Gross, 67 Minn. 224, 69 N. W. 894, was an attempt to enforce an executory contract for the purchase of stock at less than its par value.

2. It is further contended by defendant that the action as disclosed by the allegations of the complaint is one to set aside the stock held by him on the sole ground that it was issued without consideration, and that the court erred in admitting evidence of and finding as a fact that the transaction was fraudulent. We do not construe the complaint in the light presented by counsel. Its allegations are broad enough squarely to present the issue whether the Kildall transaction was a fraud from beginning to end to which the question of consideration or no consideration was a mere incident. It alleges that stock was unlawfully and fraudulently issued to Kildall, and that he paid no considera-

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tion therefor. If defendant desired more particular information in reference to the fraud, he should have moved seasonably for more definite and specific allegations. The o[illegible]tion that the complaint is indefinite or uncertain in this respect cannot be raised either by demurrer or objection at the trial. The evidence established beyond doubt that the transaction was a fraud. Kildall had no fishing locations to sell, and the fishing tackle and other items of property referred to in his offer to the corporation were worthless and of no value whatever. By his offer of sale he valued the "locations" at $20,000, yet he had no locations whatever, and conveyed no such rights to the corporation.

At the time of the transaction, he was one of the directors of the corporation, and acted as secretary at the meeting at which the bargain and sale were consummated, and voted in favor of accepting his proposition, well knowing that the corporation would, in fact, receive no value for the stoc' to be issued to him. It is this fraud that plaintiffs seek to expose, [illegible]d not a cancellation of the stock on the simple ground of no consideration, and the fact that the evidence disclosed, and the court found, that a small consideration did in fact pass to the corporation in the form of Kildall's services as secretary for the term of two years, which the court valued at $300 per year, and which services he a[illegible]ed to render as a part of his proposition, does not defeat the main [illegible]rpose of the action. If the case involved a mere question of legal [illegible]tle to the stock, the consideration stated would be sufficient to establish that legal right, but it is not such an action. On the contrary, it is one in equity, and is controlled by the rules and principles of law appropriate to that branch of jurisprudence.

Defendant Staight was a party to the fraud; at least had knowledge of all the facts, and is in no position to complain of the result; for, so far as disclosed by the record, he parted with nothing for the stock transferred to him by Kildall, and no rule of equity with which we are familiar will sustain his title to the stock so fraudulently obtained.

3. It is also contended that plaintiffs cannot maintain the action for the reasons: (1) That "the bringing of an action to cancel the stock was a matter within the discretion of the board of directors, and in the absence of fraud or bad faith on their part their refusal is final. (2) In any event application should have been made to the stockholders, or such circumstances shown as would make such application use-

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less." Neither of these points is well taken. The fact that the transaction complained of was fraudulent and operated to the damage and injury of the stockholders of the corporation made it the duty of the officers thereof to bring an action in compliance with the request of plaintiffs. This they refused to do for the apparent reason that it might involve some of the present directors who were such at the time of the transaction, but were in fact guilty of no intentional wrongdoing. However, when the demand to sue was made upon them, at a meeting of the managing officers they placed upon the records a resolution to the effect that the transaction was a fraud, but they declined to go further, anticipating it is fair to assume from the evidence the bringing of this particular action. It being the duty of the officers to protect the stockholders and the corporation from the fraud of others, it cannot well be said to be discretionary with them whether to perform that duty, and their refusal cannot bar an action by an interested stockholder.

There is respectable authority for the proposition that in cases of this kind, where stock of a corporation has been fraudulently issued by its officers, the stockholders may maintain an action for its cancellation without requesting that the action be brought by the corporation. The action in such case is not in the interests of the corporation, but in the interests of and for the protection of the individual rights of stockholders. 26 Am. & Eng. Enc. (2d Ed.) 978; Stebbins v. Perry, 167 Ill. 567, 47 N. E. 1048; Kimball v. New England, 69 N. H. 485, 45 Atl. 253; Luther v. Luther, 118 Wis. 112, 94 N. W. 69, 99 Am. St. 977. But we need not go so far in the case at bar. A demand was in fact made upon the officers of the corporation; they refused to bring the action, and we hold that their refusal was not final. In other words, they had no discretion in the premises whatever, at least in so far as an exercise thereof would bar an action by individual stockholders. It is also clear that the demand upon the managing officers of the corporation was sufficient, and it was unnecessary that plaintiffs go further, and invoke the aid of other stockholders. 2 Clark & Marshall, Priv. Corp. § 543; Pencille v. State Farmers' M. H. Ins. Co., 74 Minn. 67, 76 N. W. 1026, 73 Am. St. 326; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261, 276; 3 Pomeroy, Eq. Jur. (3d Ed.) § 1095, and cases

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cited. A different rule is applied by the federal courts. 26 Am. & Eng. Enc. (2d. Ed.) 979.

There is a class of cases, however, where the refusal of the corporation through its officers to proceed is not sufficient to justify an action by an individual stockholder and in which he must appeal to the other stockholders to join him. This includes such rights of action as accrue to the corporation itself, not those accruing to the stockholders. In such case the refusal of the officers to bring suit, if in their judgment the interests of the corporation require that they refrain, is final, and can be overcome only by a combination of a majority of the stockholders. Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456; 26 Am. & Eng. Enc. (2d Ed.) 1, 981. To this class belong nearly all the citations in appellant's brief in support of his contention on this branch of the case, within which the case at bar does not come. Here the injury complained of, and consequently the right of action, accrued to the stockholders, and not to the corporation as such.

4. Counsel also contend that the transaction, however fraudulent it may have been, was subsequently ratified by the corporation. This claim is without merit. In the first place no facts are found which justify the contention, and there was no error in the refusal of the court to so find. Moreover, if the transaction was fraudulent as to the stockholders, it was incapable of ratification by the corporation without their acquiescence and consent. 2 Cook, Corp. 653. It may be that the record presents such acts on the part of some of the stockholders or officers of the corporation as would sustain the theory of ratification, if at the time they were aware of the fraud. But no such conduct, with notice of the fraud, was traced to these plaintiffs, or either of them, and a finding that they had ratified the fraud, had it been made, would find no support in the evidence.

This covers all questions requiring special mention. We discover no error in the refusal to amend the findings, nor in the action of the court directing on its own motion an amendment to the complaint (Briggs v. Rutherford, 94 Minn. 23, 101 N. W. 954; Adams v. Castle, 64 Minn. 505, 67 N. W. 637), and no reversible error in any of the other assignments.

Judgment affirmed.

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WILLIAM G. BEAN v. KELLER MANUFACTURING COMPANY.[1]

February 19, 1909.

Nos. 15,957—(236).

Contributory Negligence.

In an action for damages for personal injuries, it is *held* that the trial court properly directed a verdict for defendant on the ground that plaintiff was guilty of contributory negligence.

Action in the district court for Stearns county to recover $15,680 damages for personal injuries. The grounds of defendant's negligence alleged in the complaint are stated in the third paragraph of the opinion. The case was tried before Taylor, J., who directed a verdict in favor of defendant. From an order denying his motion to set aside the verdict and grant a new trial, plaintiff appealed. Affirmed.

James R. Bennett, Jr., and *Dodge & Tautges*, for appellant.

Theodore Bruener and *Reynolds & Roeser*, for respondent.

BROWN, J.

Action for personal injuries, in which, at the close of plaintiff's case, the court directed a verdict for defendant on the ground of contributory negligence on the part of plaintiff, and the latter appealed from an order denying a new trial.

Plaintiff, forty six years of age, was employed at defendant's factory, and had been so employed for two years prior to the accident complained of. He had during that time been engaged in operating different machines used and employed in the factory and moved by motive power. At the time of his injury he was operating a tenoning machine, equipped with revolving knives for tenoning wagon spokes and a rapidly revolving circular saw used in trimming the ends of the spokes preparatory to their use in another part of the factory. He had worked at this particular machine but a few days; but the evidence shows that from his experience in the factory he was familiar with it, and also with the dangers incident to its operation. The frame to which the saw and knives were attached was of ordinary construction, and extended along and in close proximity to the wall of the factory building. His

[1] Reported in 119 N. W. 801.

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position in operating the machine was in front of the frame facing the wall. Upon the wall, in receptacles prepared for the purpose, hung a wrench and other tools necessary for use in connection with the operation of the machine, and an oil can, all within reaching distance from plaintiff's position when working the machine. The circular saw was located at one end of the frame and about twenty inches from the wall of the building, while the frame itself was but eleven inches from the wall. The machine was started and stopped by the use of a lever located on the side thereof near the position of the operator. The saw was wholly unguarded, and plaintiff was injured by coming in contact with it in the following manner:

At about the close of the day's work, on October 12, 1907, at 5:30 in the evening, plaintiff heard a "squeaking noise" in some of the gearings of the machine which suggested to him that some of the bearings required oiling. He testified that he could not locate the sound from his place at the machine, so he went around to the back of the frame, to ascertain its precise location and then oil it. He located the point requiring oiling, and then reached toward the oil can held in the receptacle on the wall, and in some manner slipped and fell, striking his elbow on the revolving saw, and receiving the injuries complained of. He thereafter brought this action for damages, and in his complaint charged defendant with negligence in three respects: (1) The failure properly to guard the saw, as required by statute; (2) the failure to warn and instruct plaintiff of the dangers and hazards incident to his work; and (3) the failure to provide him a safe place in which to perform the duties of his employment. Defendant answered, denying the negligence alleged against it, and affirmatively alleging that the accident was caused solely by the contributory negligence of plaintiff.

There is no doubt that defendant was, under the evidence, chargeable with actionable negligence for its failure to guard the saw; and this would entitle plaintiff to a verdict, irrespective of the other grounds alleged by him, unless he either assumed the risk of working about the unguarded saw or was guilty of contributory negligence. The trial court instructed a verdict against him on the grounds that he assumed the risk and was also guilty of contributory negligence, conceding, as we understand the record, that the negligence of defendant was sufficiently shown. We have therefore for consideration on this appeal

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the sole question whether the court below was right in its conclusion that the evidence was conclusive of plaintiff's own negligence or that he assumed the risk. In our view of the evidence, it becomes unnecessary to consider the question whether the court erred with reference to the assumption of risk. It is clear that plaintiff was guilty of contributory negligence, and the order of the court below so holding must be sustained. The action of the court being sustained on that ground, the question of assumption of risk requires no further mention.

Plaintiff was familiar with the machine on which he was at work, knew the dangers and risks surrounding him, was a man of mature years, and fully appreciated the result of coming in contact with a rapidly revolving saw. It was dark at his place of work when he attempted to locate the place to be oiled, and he could not discover it from his position at the machine, so he proceeded to the back of the machine to learn its whereabouts. He well knew that he was at that time in close proximity to the revolving saw, and deliberately made an attempt in the dimly lighted room to oil a part of the machine immediately adjacent to it. After locating the place to be oiled, he could, without the least inconvenience, have returned to his proper position and by pulling the lever brought the machine to a stop and made the performance of the act perfectly safe. Instead of doing this, however, he groped around in the dark in the immediate vicinity of the revolving saw and was injured. He testified on the trial that he had at the time no thought of the dangerous position he was in, and was evidently wholly unmindful of his surroundings. At one point in his evidence he testified that his attempt to oil the machine from this point was for the purpose of saving the time of his employer; that, if he had not then oiled it, he would have been required to return to the front of the machine and perform the act from that point. He subsequently testified, however, that it was just as convenient to oil it from behind the machine as elsewhere, and that he entertained no thought of danger from the revolving saw in doing so. Neither reason is sufficient to excuse his conduct. There was a perfectly safe way in which to perform this service, viz., by returning to his post, stopping the machine, if necessary, and then applying the oil; but he chose a dangerous method, and must be held guilty of the charge of contributory negligence. The case comes within the facts of Moody v.

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Smith, 64 Minn. 524, 67 N. W. 633. Christianson v. Northwestern Compo-Board Co., 83 Minn. 25, 85 N. W. 826, 85 Am. St. 440, is not in point. In that case the plaintiff was injured by an unprotected saw while engaged at his post in operating it, and not while at a place he was not required to be, as in the case at bar.

Counsel claimed on the oral argument that plaintiff was justified in going behind the machine to oil it, because he had observed others doing the same thing. But we discover no evidence supporting this claim. While plaintiff testified that he had seen other employees behind the machine, he did not say that they were there performing the service he was attempting to perform on this occasion; and the evidence is clear that the ordinary method of oiling the machine was from the operator's position when at work operating the same.

Counsel ask the court to reconsider the question whether assumption of risk and contributory negligence is available to defendant in a case of this kind, where his negligence is founded in a failure to comply with the statutes requiring the guarding of dangerous machinery. The case of Anderson v. C. N. Nelson Lumber Co., 67 Minn. 79, 69 N. W. 630, declaring the defense available in such cases, has been too often followed and applied to be now departed from. A change of the rule there laid down should be made by the legislature, if a change is deemed advisable.

Our conclusion, therefore, is that the trial court was right in declaring contributory negligence as a matter of law.

Order affirmed.

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STATE v. CHARLES E. CROMBIE.[1]

February 19, 1909.

Nos. 15,958—(47).

Board of Dental Examiners—Constitution.

The defendant was convicted of the offense of practicing dentistry without a license. *Held*, section 2316, R. L. 1905, as amended by Laws 1907, p. 128, c. 117, § 3, relating to the registration of licensed dentists, does not delegate either legislative or judicial powers to the board of dental examiners, and it is constitutional.

Public Offense—Evidence.

The complaint states a public offense, and the evidence is sufficient to sustain the conviction of the defendant.

Defendant was convicted in the municipal court of Minneapolis of the offense of practicing dentistry without a license. The case was tried before Waite, J., who found defendant guilty and ordered that defendant pay a fine of $25 or be imprisoned twenty five days. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Tryon & Booth, for appellant.

The statute under which defendant was prosecuted is unconstitutional, because it attempts to vest both judicial and legislative power in the board of dental examiners in that it authorizes them to ascertain what the law of a foreign state is, to compare it with Minnesota law, to decide whether the standards for practicing dentistry in a foreign state and in this state are equal and to reject a qualified practitioner at their discretion. Sanborn v. Commissioners of Rice County, 9 Minn. 258 (273); State v. Young, 29 Minn. 474; State v. Simons, 32 Minn. 540; Anderson v. Manchester Fire Assur. Co., 59 Minn. 182; State v. Great Northern Ry. Co., 100 Minn. 445; Harmon v. State, 66 Oh. St. 249; Noel v. People, 187 Ill. 587.

Edward T. Young, Attorney General, and *George E. Kremer,* for the State.

[1] Reported in 119 N. W. 658.

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START, C. J.

The defendant was convicted in the municipal court of the city of Minneapolis of the offense of practicing dentistry without having obtained a certificate of registration as a licensed dentist. He appealed from an order denying his motion for a new trial.

1. It is urged on his behalf that the statute under which he was prosecuted (R. L. 1905, §§ 2313–2319, as amended by Laws 1907, p. 127, c. 117) is unconstitutional, because it attempts to vest in the board of dental examiners both legislative and judicial powers. No question is or can be made as to the constitutionality of the statute regulating the practice of dentistry as it stood before its amendment by Laws 1907, c. 117, which re-enacted and amended sections 2314–2316, and 2319, R. L. 1905. State v. Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119.

Section 2316 originally provided for the examination of applicants for registration as licensed dentists, and prescribed the character and extent of such examination. As amended the section contains this proviso: "Provided, that any dentist who has been in legal practice in another state having and maintaining an equal standard of laws regulating the practice of dentistry with this state for five years or more, and is a reputable dentist of good moral character, and is desirous of removing to this state and deposits in person with the board of dental examiners a certificate from the examining board of the state in which he registered, certifying to the fact of his registration and that he is of good moral character and professional attainments, may, at the discretion of the board, be granted a license to practice in this state without further theoretical examination." The defendant claims that this proviso renders the statute of 1907 unconstitutional, because it delegates legislative and judicial powers to the dental board.

If this be so, it cannot avail the defendant anything; for the act contains no repealing clause, and if the proviso be void the result follows that either the whole amendatory act is void, which would leave the original statute in full force, or, if the provisions of the proviso and the other provisions of the act are not interdependent, the proviso only fails, leaving the other provisions of the act in force as a valid statute forbidding and punishing the act of which the defendant was convicted. The presumption, however, is that the proviso is constitutional,

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and it cannot be declared void unless it is clearly and obviously an attempted delegation of legislative or judicial powers, or both, to the dental board. The proviso here in question is in important respects similar to the provisions of a proviso in section 5, c. 19, p. 62, Laws 1889, which was held to be constitutional in the case of State v. Vandersluis, supra. It is true that in the case cited the effect of such proviso was not raised or decided. This is significant, for the constitutionality of the act was challenged, and, if it were obvious that the proviso delegates legislative or judicial powers to an executive board, it is fair to assume that it would not have escaped the attention of the court and counsel in that case.

The proviso here in question must be read and construed in connection with the other provisions of the section of which it is a part. They are to the effect that an applicant, desiring to be registered as a dentist, shall present himself for examination to the board and produce his diploma from some dental college of good standing, of which the board shall be the judge; that he shall pass such an elementary and practical examination as to thoroughly test his fitness for the practice of dentistry; that such examination shall include the subjects specifically named therein; and, further, that he shall demonstrate his skill in operative and mechanical dentistry.

Now, it is apparent that it would be unnecessarily burdensome and unfair in many cases to require a competent and reputable dentist, who has been in legal practice in another state for at least five years, and who desires to become a citizen of our state and practice his profession, to take the whole of the theoretical examination required of a neophyte. The difference, in the situation, circumstances, training, and experience, between such a practitioner and one desiring to commence the practice of dentistry, naturally suggests the propriety and justice of a statutory provision dispensing with the theoretical examination of such trained practitioner, which is the general rule of the statute, if his fitness for registration may be ascertained by a less strict theoretical examination; the extent of the examination, within the limits of the statute, resting in the fair discretion of the board. Such is manifestly the purpose of the proviso in question.

Cognate considerations led this court, in prescribing rules for the examination and admission of persons to practice as attorneys in the

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courts of this state, to provide for dispensing, in the discretion of the board of law examiners, with any examination of attorneys of five years' standing from any other state, except an examination of papers presented by them to the board.

Now, if the proviso be read in connection with the other provisions of the section of which it is a part and with the purpose of its enactment in mind, it is clear that it does not delegate to the dental board either legislative or judicial powers within the meaning of our constitution. It does not purport to confer upon the board the discretionary power, as defendant claims, to admit or reject qualified dentists from other states. The only reasonable construction of the act of 1907, construing it as a whole, is that in the case of a practitioner of five years from any other state the board may, in the exercise of a fair discretion, dispense with a further theoretical examination, and license him to practice in this state, if from the examination given him and the papers presented by him the board is satisfied of his fitness to practice. If from such examination and papers the board is not so satisfied, he must take the regular examination. The board has no power arbitrarily to refuse registration to any applicant; or, in other words, the discretion that may be exercised by the board relates only to the extent of the examination to be given to a practitioner from another state, and the proviso is intended to relieve such an applicant, upon the conditions named therein, from the strict theoretical examination which all applicants for registration were required to pass before the proviso was enacted.

We therefore hold the act in question, including the proviso, constitutional.

2. The defendant was designated in the complaint and warrant as "Charlet E. Crombie," and upon being brought into court he moved that he be discharged on account of the misnomer. The motion was denied, and the ruling is here assigned as error. There is no question as to the identity of the defendant, or that the right person had not been brought before the court. The ruling was correct. The decisions of this court as to the misnomer in civil cases are not applicable to criminal prosecutions, in which the defendant is personally brought before the court and his identity established. In such cases, if it appears

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that a mistake has been made as to his true name, it may be inserted in the records. R. L. 1905, § 5300.

3. This case was prosecuted by the attorney of the dental board by the express authority of the attorney general and the request of the city attorney of Minneapolis. The defendant moved to dismiss the case because it was not prosecuted by the city attorney, as provided by R. L. 1905, § 143. The court correctly denied the motion. The statute was not intended to limit the general powers of the attorney general as the chief law officer of the state. State v. Robinson, 101 Minn. 277, 112 N. W. 269.

4. It is claimed that the complaint does not charge a public offense. It alleges, after stating venue and time, that the defendant did wilfully, unlawfully, and wrongfully, without theretofore having obtained from the state board of dental examiners in and for said state a certificate of registration as a licensed dentist, practice dentistry, in this: That he did then and there perform certain dental operations for one Mary Hunt, for which he received the fee of $9.50, contrary to the statute in such case made and provided. The complaint charges that the defendant practiced dentistry without having a certificate of registration as a licensed dentist, by performing dental operations for the person therein named, contrary to the statute. The precise character of the operations is not a substantive part of the offense, the gist of which is that the defendant practiced dentistry without a license. State v. Oredson, 96 Minn. 509, 105 N. W. 188. We have examined in detail the several objections to the sufficiency of the complaint urged by the defendant, and have reached the conclusion that it charges a public offense, and that the court did not err in denying defendant's motion to dismiss for the reason urged. Nor did the court err in denying his motion to dismiss for the alleged reason that the complaint was not verified by a person having knowledge of the facts.

5. The defendant further contends that the evidence was not sufficient to justify his conviction. The evidence is undisputed, as the defendant offered no evidence, that at the time and place alleged the defendant pulled two teeth and fitted a tooth with a crown for the person named in the complaint, for which she paid him $9.50. The defendant urges that there was no proof that he was not within the exception of the statute relating to students. The exception, however, is

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not a part of the enacting clause, and is not descriptive of the offense. If, then, the defendant was in fact a student, and within the exception, the burden was on him to prove the fact. The evidence is sufficient to sustain the finding of the trial court.

Order affirmed.

STATE v. CHARLES E. CROMBIE.[1]

February 19, 1909.

Nos. 15,959—(48).

Practice of Dentistry—Due Process of Law.

Section 2315, R. L. 1905, as amended by Laws 1907, p. 128, c. 117, § 2, does not violate the provision of either the state or federal constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law.

Defendant was charged in the municipal court of Minneapolis with using the letters D. D. S. in connection with his name and advertising that he would perform dental operations, contrary to the statute in such case made and provided. Defendant appeared specially and moved to be discharged on the ground the prosecution was not conducted by the proper officers. The motion was overruled. He also demurred to the complaint on the ground it did not state facts sufficient to constitute a public offense. It was agreed the demurrer should be decided at the time of the decision of the case, upon the evidence. The defendant then pleaded not guilty. The facts were stipulated. Defendant also moved to dismiss the proceeding. The court, Waite, J., overruled the demurrer, adjudged the defendant guilty, and imposed a fine of $25 or ten days. From the judgment entered thereon, defendant appealed. Affirmed.

Tryon & Booth, for appellant.

Edward T. Young, Attorney General, and *Geo. E. Kremer,* for the State.

[1] Reported in 119 N. W. 660.

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START, C. J.

This is an appeal by the defendant from the judgment of the municipal court of the city of Minneapolis adjudging him guilty of the offense of practicing dentistry without a license, contrary to the provisions of section 2319, R. L. 1905, as amended by Laws 1907, p. 129, c. 117, § 4.

The statute (section 2315, R. L. 1905, as amended by Laws 1907, p. 128, c. 117, § 2) provides what shall constitute practicing dentistry in these words: "All persons shall be said to be practicing dentistry, within the meaning of this section, who shall use the word or letters 'Dentist' or 'D. D. S.,' or any other letters or title in connection with his name which in any manner represents him as engaged in the practice of dentistry.

The complaint was to the effect following: That the defendant, Charles E. Crombie, at the time and place therein stated, did unlawfully, without theretofore having obtained from the state board of dental examiners of this state a certificate of registration as a licensed dentist, practice dentistry, in this: That he did then and there use the letters "D. D. S." in connection with his name and advertise that he would perform dental operations, contrary to the statute in such case made and provided.

The facts upon which the defendant's conviction of the offense charged is based were stipulated, and are to the effect following: On July 8, 1908, the defendant, without having obtained a certificate of registration as a licensed dentist from the board of dental examiners of this state, advertised himself to be a dentist by placing the following signs in the windows of his place of business in the city of Minneapolis:

"Chas. E. Crombie, D. D. S.
Dentistry
In-lay Method."

He became a resident of this state in the year 1906, and since then he has made use of the letters "D. D. S." and the word "Dentist," in connection with his name, both upon his office door and upon his stationery.

He graduated from the Chicago College of Dental Surgery, in the state of Illinois, in 1903, and received its diploma, granting him the de-

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gree of Doctor of Dental Surgery, which is indicated by the letters D. D. S. The college was authorized to grant the degree. In the same year he became a duly registered and licensed dentist of the state of Illinois, and received from its board of dental examiners a registration certificate, which has never been revoked. He practiced dentistry in the state of Illinois from 1898 to 1906, and was duly authorized so to practice dentistry therein prior to his receiving such certificate of registration.

He has, since October, 1906, maintained an office in the city of Minneapolis. During that time a large part of the work done by him has consisted in manufacturing dental products, among others, plate work, bridge work, crown work, and in-lay work. A large part of the business so carried on by him has been performed by him, or under his direction, for parties outside of the state of Minnesota. The use by him of the letters "D. D. S." and "Dentist" and "Dentistry" has been in connection with such work done by him, and it has been to a large degree instrumental in obtaining such work.

Before the commencement of this prosecution he inquired of the dental board of this state if it would admit a person duly authorized to practice dentistry in the state of Illinois to practice in this state upon the production of his certificate of registration and his diploma, and otherwise complying with the provisions of the proviso contained in section 2316, R. L. 1905, as amended by Laws 1907, c. 117, and was advised by the board that it did not admit dentists to practice in this state upon certificates brought from Illinois, for the reason that it did not consider the standard required by the laws relating to dentists in that state equal to that required by the laws of this state. The trial court excluded as immaterial evidence of the admitted fact that the defendant was a duly licensed and registered dentist in Illinois, and had been for many years a duly practicing dentist therein; but the conclusion we have reached in this case is based upon a consideration of all of the admitted facts.

The contention of the defendant is that the provisions of the statute referred to are unconstitutional, because they make the use of the letters D. D. S. conclusive evidence that the person so using them is practicing dentistry in this state, and, further, that they are in conflict with sections 3 and 7 of article 1 of our state constitution, which

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guarantee the liberty of speech and press, and that no person shall be deprived of life, liberty, or property without due process of law, and also that they violate the fourteenth amendment to the constitution of the United States.

The provision of the statute to the effect that a person who does the acts therein specified "shall be said to be practicing dentistry" is in substance the same as one found in R. L. 1905, § 2300, relating to the practice of medicine, which declares that a person shall be regarded as practicing medicine, within the meaning of the act, who shall append to his name the letters M. D. This last-named provision was sustained, as a valid exercise of the police power, in State v. Oredson, 96 Minn. 509, 105 N. W. 188, for the reason, as stated by Jaggard, J., that "it was designed to secure the public in whole and in every part from quacks, humbugs, and charlatans masquerading under the venerable and honorable titles of surgeons, physicians, and doctors, and to protect the public in a just reliance upon the one using these titles as a man of proper education and sufficiently trained in the sciences involved."

Again, the fact that the defendant had practiced his profession in the state of Illinois, and that he was a registered dentist therein, gives him no vested right to practice his profession in this state without complying with the statute of this state providing for registration for the practice of dentistry and the licensing of dentists in this state. Such regulation is an appropriate exercise of the police power of the state, for the right of a dentist to practice his profession in this state is subordinate to such reasonable limitations and regulations as the legislature may deem necessary and expedient for the protection of the public. It is clear that the regulation in question is not an unreasonable one, for it requires dentists registered in other states to pass the same examination which all dentists of this state must take, except in cases falling within the proviso in section 2316, R. L. 1905, as amended by Laws 1907, c. 117. State v. Crombie, supra, page 166, 119 N. W. 658.

It is not necessary to enter into any discussion to demonstrate that statutes of the character of the one here under consideration do not violate the provision of either the state or federal constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law, for the proposition is clearly settled by

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the decisions of this state and of the supreme court of the United States. State v. Hovorka, 100 Minn. 249, 110 N. W. 870, 8 L. R. A. (N. S.) 1272. The statute is not unconstitutional for any of the reasons urged by the defendant.

Other alleged errors urged, meriting consideration, are disposed of by our decision in the case of State v. Crombie, supra.

Judgment affirmed.

STATE v. L. E. BROWN.[1]

February 19, 1909.

Nos. 15,962—(29).

Wineroom Ordinance.

A licensed saloon keeper cannot evade the wineroom ordinance of the city of Minneapolis by renting a part of the room covered by his license to a third party, so arranged that it may be used as a wineroom in connection with his bar.

Defendant was convicted in the municipal court of Minneapolis of violating the wineroom ordinance of that city. The case was tried before Waite, J., who found defendant guilty and imposed a fine of $25 or imprisonment in the city workhouse not exceeding thirty days. From an order denying his motion for a new trial, defendant appealed. Affirmed.

John M. Rees, for appellant.

Frank Healy, City Attorney, and *Clyde R. White,* Assistant City Attorney, for the State.

START, C. J.

Appeal by the defendant from an order of the municipal court of the city of Minneapolis, denying his motion for a new trial after his conviction of a violation of the wineroom ordinance of the city. The contention of the defendant is to the effect that the evidence is not sufficient to justify his conviction.

[1] Reported in 119 N. W. 657.

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The record discloses evidence tending to show the facts following: On the day named in the complaint the defendant was conducting a licensed saloon for the sale of intoxicating liquors on the first floor of the premises known as No. 110 Third Street South, Minneapolis, which is one hundred by twenty feet. A board partition, some eight feet high, but not reaching to the ceiling, ran across the room about sixty feet from the front, with a doorway, without any door, four feet wide in the center of the partition, and back of this opening was a screen, so that no one could see from the front inclosure into the rear one. There was a door leading from the alley into the rear room, and from it to the bar. The front room was used by the defendant for the saloon proper; but the rear part was rented by the defendant to a third party, in which he conducted a restaurant. Men and women, twenty five or thirty of them at times, came into this rear room, sat around the tables, and drank liquors brought to them by the waiters from the bar in the front room.

It is urged on behalf of the defendant that the fact that the rear inclosure was rented to a third party distinguishes this case from State v. Barge, 82 Minn. 256, 84 N. W. 911, 53 L. R. A. 428, and State v. McGregor, 88 Minn. 74, 92 N. W. 509, because, as it is claimed, the defendant had no control of the rear room.

The defendant was bound to control the premises covered by the license, and could not evade responsibility by surrendering such control by leasing a part of the premises, so arranged as to be admirably adapted for use as a wineroom in connection with the bar. This case cannot be distinguished from those cited, except that it is a more aggravated one; and we hold that the evidence is sufficient to warrant the defendant's conviction.

Order affirmed.

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MAUDE H. STROMME v. GUSTAV RIECK and Another.[1]

February 19, 1909.

Nos. 16,025—(264).

Wife's Consent to Sale of Husband's Realty.

The signature of the wife as a witness to an executory contract by the husband for the sale of his real estate, she being in no way referred to in the body of the contract as a party thereto, does not constitute on her part a written consent to the sale within the meaning of section 3648, R. L. 1905.

Parol Contract—Evidence.

Evidence *held* insufficient to show a parol contract for the sale of the land by the wife.

Specific Performance by Husband.

An executory contract for the sale of the husband's real estate other than the homestead, signed by him alone, may be enforced by the vendee to the extent of the vendor's ability to perform, but not against the interest of the wife.

Contract by Husband as Agent of Wife.

Where a husband, acting as the agent of his wife, enters into an executory contract in her name for the sale of her land, and she thereafter confirms his act and offers and tenders performance, the vendee cannot refuse performance on his part on the ground that the contract is void under the statutes because made by the husband as agent. Keystone Iron Co. v. Logan, 55 Minn. 537, followed.

Action in the district court for Hennepin county against Gustav Rieck and Anna Rieck, his wife, to enforce the specific performance of a contract to convey to plaintiff a certain farm, and certain property situated thereon, in exchange for a specified amount of money and a conveyance of certain real estate in Minneapolis, and to recover $1,000 damages. The contract is quoted at length in the opinion.

The complaint alleged that plaintiff had tendered to defendant proper conveyances of the Minneapolis property and with the consent of the defendants had taken possession of the farm in Anoka county, had leased the same at the request of defendants to a tenant and had

[1] Reported in 119 N. W. 948.

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made valuable improvements thereon. The answer alleged that the pretended agreement between plaintiff and defendant Gustav Rieck was void because signed by plaintiff's husband, and denied the other allegations of the complaint.

The case was tried before John Day Smith, J., who made findings of fact and as conclusion of law found that plaintiff was entitled to a decree requiring defendants, as husband and wife, to execute and deliver to plaintiff a proper deed of conveyance of the property in Anoka county; that plaintiff was also entitled to judgment requiring defendant Gustav Rieck to execute a proper conveyance by bill of sale of the personal property described in the schedule attached to the contract, and that plaintiff was entitled to judgment against Gustav Rieck for the sum of $490. From an order denying their motion for a new trial, and from an order denying their motion to amend the findings and conclusion of law, defendants appealed. Affirmed as to Gustav Rieck, but reversed and a new trial granted as to Anna Rieck.

A. C. Middlestadt, for appellants.

C. D. Austin, for respondent.

BROWN, J.

Action for the specific performance of a contract for the sale and exchange of certain real property. On the trial below judgment was directed for plaintiff, and defendants appealed from an order denying a new trial.

The facts, briefly stated, are as follows: Plaintiff owned certain property in the city of Minneapolis, and defendant Gustav Rieck owned a farm in Anoka county. They entered into a contract for the exchange of these properties; plaintiff being represented in the transaction by her husband, W. A. Stromme. The contract was in writing, and in the following language:

"This agreement made and entered into by and between Gustav Rieck of St. Paul, Minn., party of the first part, and Maude H. Stromme of Minneapolis, Minn., party of the second part.

"For the consideration of ten dollars in hand paid to the party of the second part, and the further sum of one hundred and ninety dollars, to be paid on the delivery of certain deeds and abstracts hereinafter specified, and three hundred dollars January 1st, 1908, and a war-

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ranty deed and abstract to the S. ½ of N. E. ¼ Sec. 29, Twp. 34, range 22, and the N. W. ¼ and N. E. ¼ of the N. W. ¼ Sec. 29, Twp. 34, range 22, and part of lot 4, Sec. 28, Twp. 34, range 22, all in Anoka county, Minn., free of all incumbrances, by the party of the first part.

"The party of the second part agrees to give warranty deeds and abstracts to the party of the first part to the following properties: Large house and barn situated on lots 11–12, block 2, Ways addition to Minneapolis, Minn., subject to a mortgage of $1,500.00. One two-story building situated on lots 25 and N. ½ of lot 24, block 1, in Camden Park addition to Minneapolis, Minn., subject to a mrtge of $600.00. One story and half house with small barn situated on lot 6 & N. ½ of lot 7, block 2, in Camden Park addition to Minneapolis, Minn., subject to a mortgage of $350.00. The party of the first part further agrees to give party of the second part possession of the house in Ways add until the first of May free of charge. The farm above described to contain personal property as per schedule attached. The party of the second part further agrees to install necessary gas fixtures, and have new glass put in where needed in the house on lots 11 and 12, block 2, Ways add, also to pay the first half of 1907 taxes on the same, & a quitclaim deed to a lot adjoining lots in Ways add.

"Dated at St. Paul, Minn., this 31st day of Oct., 1907.

"Maude H. Stromme.
"By W. A. Stromme.
"Gustav Rieck.

"Witness:
"Anna Rieck."

Anna Rieck who signed the contract as a witness was and is the wife of Gustav Rieck. Plaintiff acquiesced in and confirmed the contract made by her husband, and has offered and tendered performance of the same. Both defendants refused to perform and this action followed.

The assignments of error present several questions which will be disposed of in their order.

1. Defendants contend that the contract is void for indefiniteness and uncertainty, and therefore incapable of enforcement. The precise point is that the contract contains no language or words showing an

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intention to sell, exchange, or convey the property mentioned by one party to the other. While the writing is not so clear and explicit as it might have been made, fairly construed, it sufficiently expresses an agreement for the exchange of the properties, and meets all the requirements of the statute of frauds. That the parties intended to exchange the properties is too clear to admit of dispute.

2. It is also urged that the contract is void under the provisions of section 3609, R. L. 1905, which declares invalid all contracts between husband and wife relative to the real estate of either and any power of attorney or other authority from one to the other to sell or convey the real estate of either. The contract in question was made on behalf of plaintiff by her husband acting as her agent, and no claim is made that she participated in the transaction. While it is clear under the statute referred to and the decisions of this court that the contract could not be enforced against Mrs. Stromme, still, under the doctrine of Keystone Iron Co. v. Logan, 55 Minn. 537, 57 N. W. 156, it may be enforced by her. It was held in that case that where the husband enters into a contract for the sale of his wife's real estate, and she thereafter confirms his act, and stands ready to perform, the other party cannot take advantage of the statute to repudiate the obligations undertaken by him. The facts of this case bring it within the rule there laid down. Here plaintiff's husband entered into the contract as her agent and she confirms his act, and stands ready to perform all the obligations imposed upon her by the writing. In this situation defendants are in no position to urge that the statute has been violated.

3. It is further claimed that the contract is not enforceable because not signed by the wife of defendant Gustav Rieck. We here reach the only serious question in the case. Mrs. Rieck did not in fact join in the contract, and the question presented is whether it may be enforced as against her interest in the land. The land did not constitute the homestead of the parties; and, while it is clear under our decisions that the contract may be enforced as to the husband to the extent of his ability to perform, it is equally clear that it cannot be enforced as against the wife. Schwab v. Baremore, 95 Minn. 295, 104 N. W. 10; Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817. It rests with the opposite party in such case to determine whether to accept performance by the husband alone or abandon the contract. He

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may not be compelled to accept part performance, but may do so at his option, unless, as in the Baremore case, the refusal of the wife to join in the conveyance constitutes a defect in the title which renders the contract by its terms wholly void. The contract in question did not so provide, and plaintiff may insist on performance by the husband, but not against the wife, unless she in some way legally bound herself to its performance.

Counsel for plaintiff recognizes this situation, and in avoidance of its legal consequences maintains that Mrs. Rieck did consent to convey her interest in the property. This position is founded on the claims (1) that Mrs. Rieck orally contracted to sell her interest in the land and that there was a sufficient part performance to render it valid; and (2) that her signature as a witness appended to the contract was a sufficient consent, within the meaning and purpose of our statute on the subject, to the sale by the husband. We are unable to concur in either of these contentions. The trial court found an oral contract by Mrs. Rieck to sell her interest in the land and also part performance; but we are unable to discover evidence sustaining the findings. The basis of the claim that there was an oral contract is found in the fact that Mrs. Rieck had full knowledge of the transaction, was present during a part at least of the negotiations, and interposed no objection to the sale. But it does not appear that anything was said in reference to a relinquishment of her interest in the land, and it is apparent that the parties did not consider her consent at all necessary. Nothing was said about it, and we find no sufficient basis in the record before us to support the conclusion that she either orally or otherwise contracted or agreed to part with her rights.

Our statutes (section 3648, R. L. 1905) provide that a wife shall be entitled on the death of her husband to a one-third interest in all land owned by him at any time during the marriage relation to the sale or disposition whereof she did not consent in writing. The same right is extended the husband in the wife's land. The interest thus granted the wife, though in lieu of the former dower right, is for all substantial purposes identical with that right, and is protected by an application of the same rules and principles of law. Before a wife can be divested of her interest, it must be shown that she consented in writing to a sale of the land in which she subsequently claims a right,

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though it may be conceded for the purposes of the present case that a contract of sale by the husband, partly performed by the vendee, might bind the wife if orally consented to by her, where she received and retained a substantial benefit from the transaction. But that would be by force of the equitable doctrine of estoppel. Such is not this case, however.

The question now being considered is whether her signature as a witness to an executory contract by the husband is a sufficient written consent to the sale of the land. A careful consideration of the question leads to a negative answer. The consent of the wife rendered essential by the statute to a divestiture of her rights necessarily involves an intention on her part to relinquish her interest in the property. If she should join in the execution of the contract, though not mentioned in the body thereof, it would undoubtedly bind her. But where she is not mentioned in the contract, nor her interests in any way referred to, and she signs as a witness, expressly so designating her signature, no consent to a release of her interest can follow as a matter of law. The written contract in the case at bar contains no reference to the interests of the wife, and no attempt appears to have been made to sell or exchange the property free from any claim on her part.

The courts have been quite strict in the protection of the rights of married women in matters of this kind, both under statutes creating and defining dower rights and statutes like those of this state, and the statutory method of relinquishing those rights and interests has been held to be exclusive, barring, of course, questions of estoppel not involved in this case. Motley v. Motley, 53 Neb. 375, 73 N. W. 738; Lewis v. Apperson, 103 Va. 624, 49 S. E. 978, 68 L. R. A. 867, 106 Am. St. 903; Higginbotham v. Cornwell, 8 Gratt. (Va.) 83, 56 Am. Dec. 130. Mere knowledge of or acquiescence in a sale by the husband is not sufficient to bar her rights. 14 Cyc. 931, and cases cited; Hunt v. Reilly, 24 R. I. 68, 52 Atl. 681, 59 L. R. A. 206, 96 Am. St. 707; Foley v. Boulware, 86 Mo. App. 674. The statute requires the consent to be in writing. Welford v. Beazely, 3 Atk. 503, and Coles v. Trecothick, 9 Ves. 234, cited by plaintiff's counsel, are not in point. In the first of these cases it appeared that the person who signed under the designation of "witness" was described therein as one of the contracting parties. Not so in the case at bar. In the second case the

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signature of the contract was by an agent of the principal, and as follows:

"Witness Evan Phillips for Mr. Smith, Agent for the Seller."

It was held that, where the person to be bound by a contract signs the same as a witness when he cannot be a witness, he must be understood to have signed as principal. In the case at bar Mrs. Rieck was not designated as one of the principals in this contract, and the rule of that case has no application.

4. Defendants next contend that the description of part of the land agreed to be conveyed by plaintiff is so defective and uncertain as to render the contract wholly void. This applies to the last clause of the contract by which plaintiff agreed to make certain improvements upon the premises to be conveyed, and give a "quitclaim deed to a lot adjoining lots in Ways addition." It is claimed that there is no sufficient description of this lot, and that parol evidence was inadmissible to identify it. The contention is not sound. The lot referred to as adjoining those agreed to be conveyed by warranty deed does not appear to have been a substantive part of the contract, and plaintiff in no way bound herself to convey a title thereto. The reason for including as a part of the contract a quitclaim deed thereof is fully disclosed by the evidence. Fairly construed, the contract describes it as a lot adjoining lots 11 and 12 in Ways addition, the identical lots sold. And it is not so indefinite and uncertain as to render the whole contract a nullity. The contract in this respect was subject to explanation and the lot identified by extrinsic evidence. Tice v. Freeman, 30 Minn. 389, 15 N. W. 674; Sanborn v. Nockin, 20 Minn. 163 (178); Ames v. Lowry, 30 Minn. 283, 15 N. W. 247. The evidence fully identified the lot intended to be included by this part of the agreement to be lot 10, and immediately joining lots 11 and 12, which plaintiff, by the contract, agreed to convey by warranty deed.

5. Plaintiff tendered to defendants in performance of this part of their agreement a quitclaim deed from C. M. Way, who had an interest therein under a tax title. It was fully understood by the parties when the contract was entered into that the only interest or title to be conveyed by the quitclaim deed was that held by Mr. Way, and it was to be quitclaimed to defendants for what it was worth.

Counsel for defendants insist that they are entitled, not only to a

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quitclaim from plaintiff, but a transfer of title to the lot. In this he is in error. The contract does not call for a transfer of title, and a quitclaim from Way, who held the interest in the lot which was in the minds of the parties at the time, was a sufficient compliance with the agreement. Meyers v. Markham, 90 Minn. 230, 96 N. W. 335, 787; McNellis v. Hilkowski, 98 Minn. 127, 107 N. W. 965.

This covers all questions requiring special mention, and for the reasons given the order appealed from is affirmed as to defendant Gustav Rieck, but reversed and a new trial granted as to defendant Anna Rieck.

STATE v. I. S. KLEIN.[1]

February 19, 1909.

Nos. 16,040—(271).

Wineroom Ordinance.

State v. Barge, 82 Minn. 256, and State v. McGregor, 88 Minn. 74, construing the so-called wineroom ordinance of the city of Minneapolis, followed. The admitted facts herein sustain the conviction of the defendant of a violation of the ordinance.

Defendant was charged in the municipal court of Minneapolis of violating the wineroom ordinance of that city. The case was tried on stipulated facts before Waite, J., who ordered that defendant pay a fine of $25, or in default thereof be imprisoned in the city workhouse not exceeding thirty days. From an order denying defendant's motion for a new trial, he appealed. Affirmed.

John H. Steele and *John P. Nash,* for appellant.

Frank Healy, City Attorney, and *Clyde R. White,* Assistant City Attorney, for the State.

START, C. J.

The defendant was convicted in the municipal court of the city of Minneapolis of the offense of maintaining an inclosure, commonly called a wineroom, within a room covered by his license, for the sale

[1] Reported in 119 N. W. 656.

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of intoxicating liquors therein, contrary to the city ordinance in such case made and provided. He appealed from the judgment, and here seeks a reversal thereof on the ground that the admitted facts in this case do not bring it within any reasonable construction of the ordinance.

The here material facts are to the effect following: The defendant maintains in the city of Minneapolis a licensed saloon, known as the first floor of Nos. 36 and 38 Sixth Street south, wherein intoxicating liquors are sold at retail. Both numbers constitute one room, as designated in and covered by his license. In the front part of the licensed room he maintains another and connecting room or inclosure, with a direct entrance from the street, which is also used as one of the street entrances to the main part of the room, or saloon proper. This connecting room is fitted up with tables and seats sufficient to accommodate fifty-eight persons. Meals are served in the room to men and women during business hours. Liquors are also served therein, with such meals or without them. No minors are allowed in the room, and no intoxication permitted, nor is lounging or immorality tolerated therein; some member of the management being constantly present. This room is also kept, at all times when the saloon is opened for business, fully lighted and open to the public, including the police officers of the city.

The sole question for our decision is whether the admitted facts are sufficient to establish a violation of the ordinance. The ordinance here in question has been construed by the court. We held that the ordinance was intended to give effect to the general legislative policy of the state, of localization and publicity for the business of retailing intoxicating drinks, and to prevent the evils incident to secret lounging and drinking places, and it must be construed so as to give effect to such intention. We therefore hold that the ordinance forbids the construction or the keeping of any booth, stall, or other inclosure, in or connected with any room or place where intoxicating liquor is or may be sold by a licensed dealer, which is or can, by any ingenuity, sham, or pretense, be used as a lounging or drinking place, or for any immoral purpose. State v. Barge, 82 Minn. 256, 84 N. W. 911, 53 L. R. A. 428. And, further, that if the inclosure is of such a nature that it may be used as a lounging place, where the parties may, to some

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extent, if not entirely, be cut off from the view of the main part of the saloon, it is within the spirit of the ordinance.

To state it broadly, the object of the ordinance is to entirely do away with separate rooms, booths, stalls, or compartments, be they large or small, which may be used for the purpose of concealing or protecting persons engaged in drinking intoxicating liquors or other unlawful purposes. State v. McGregor, 88 Minn. 74, 92 N. W. 509.

If the ordinance was directed against the manner of conducting such rooms or inclosures, the defendant, upon the admitted facts, clearly would not be guilty. But such is not the purpose of the ordinance, for it is directed against maintaining within a licensed room another room or inclosure where intoxicating liquor is or may be drunk, or which is or may be used as a lounging or secret drinking place, or for any immoral purpose. The ordinance is a wholesome police regulation, intended to remove from all licensed saloons the means or opportunity for secret drinking or immoral practices, by preventing the sales of intoxicating liquors except in the open room covered by the license. This purpose of the ordinance would be defeated if the manner in which the inclosure within the licensed room was conducted were adopted as the test of the guilt or innocence of the defendant in each particular case instead of the nature of the inclosure and the purposes for which it may be used.

It is clear that the maintenance by the defendant of the inclosed room in this case within the licensed room is prohibited by the ordinance as we have and do construe it.

Judgment affirmed.

BROWN, J., dissents.

JAGGARD, J. (dissenting).

I dissent. The ordinance should be reasonably interpreted so as to effectuate the apparent legislative intent. The construction placed on it by the majority opinion is unreasonable, and if logically followed would prohibit a bar in a hotel renting rooms to guests. The purpose of the ordinance was to prevent "the wineroom evil." The room here involved did not make possible the sale of liquors in secret apartments; and its use did not violate the plain intent of the ordinance.

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GAMBLE-ROBINSON COMMISSION COMPANY v. NORTHERN PACIFIC RAILWAY COMPANY.[1]

February 26, 1909.

Nos. 15,789—(109).

Unreasonable Delay of Carrier.

Defendant, a common carrier, agreed with plaintiff to transport certain fruit from a point in Washington to a point in Minnesota. The contract provided in part that defendant did not undertake to carry freight by any particular train, but to forward with reasonable dispatch. The schedule time between the two points was seven days. The fruit in fact arrived ten days after initial delivery. No evidence was introduced to show that shipments were put on the first train leaving place of consignment, or that any demand thereunto was made, that the train which carried them took more than schedule time, or that any shipment had ever been carried between the points in less than ten days. It is *held* that no presumption of negligence arose and that plaintiff had not borne the burden of proving that defendant had failed to transport with reasonable dispatch.

Action in the district court for Hennepin county to recover $703.20 damages because of unreasonable delay in the transportation of two separate shipments of fruit. The defendant's answer alleged an agreement in each contract of shipment that in no event should the defendant be liable for damage, unless the claim therefor should be presented in writing within ten days after delivery of the fruit, and that the failure to present any such claim was a bar to the action. It further alleged that it was agreed by the contract of shipment that the defendant did not undertake to carry any of such property by any particular train nor in time for any particular market, and that it should not be responsible for loss or damage arising from delay, however occasioned, but would forward the shipment with reasonable dispatch. The reply alleged that written notice of claims showing amount of loss was seasonably delivered to defendant's freight claim agent and investigated, and was declined by defendant because it had not been guilty of negligence, and thereby defendant waived the benefit of the limitation in the shipping contracts in respect to the manner

[1] Reported in 119 N. W. 1063.

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or time of presenting claims for loss. The case was tried before Frederick V. Brown, J., who directed a verdict for defendant. From an order denying plaintiff's motion for a new trial, it appealed. Affirmed.

Geo. C. Stiles and *Wm. W. Bartlett,* for appellant.

A single question is presented by this appeal. Can a common carrier railway company absolutely exempt itself from liability for loss arising from delay in delivery, by the provision in its bill of lading, that "the corporation does not undertake to carry property by any particular train, nor in time for any particular market, nor will it be responsible for any loss or damage arising from delay however occasioned, but will forward consignments with reasonable dispatch."

In Minnesota a common carrier cannot, by any special contract, relieve itself from liability for its own negligence. We understand the term negligence to cover every default of the carrier in the performance of its duty. The fact that the rule is usually applied to actions involving actual injury, does not by any means preclude its application to other actions where the carrier is at fault. Moulton v. St. Paul, M. & M. Ry. Co., 31 Minn. 35; Lindsley v. Chicago, M. & St. P. Ry. Co., 36 Minn. 539; Boehl v. Chicago, M. & St. P. Ry. Co., 44 Minn. 191; Alair v. Northern Pacific Ry. Co., 53 Minn. 160; R. L. 1905, § 2008. The condition in the bills of lading is squarely contrary to the express requirements of law, in that it purports to absolutely relieve the carrier from liability for delay, and it does not appear that the defendant ever caused any such condition to be stated in its published classification schedules.

Whether mere delay in forwarding a shipment, which delay is unexplained and occasioned damage to the shipper, shall be deemed to be negligence on the part of the carrier, does not appear to have ever been presented to this court for determination. Other courts have held that such unexplained delay, causing loss to the shipper, is deemed to be negligence, for which the carrier is liable, notwithstanding any special contract to the contrary. Ormsby v. Union Pac. R. Co., 4 Fed. 706; Illinois v. Cobb, 72 Ill. 148; A. Kramer & Co. v. Chicago, 101 Iowa, 178; Dawson v. Chicago, 79 Mo. 296; Berje v. Texas, 37 La. An. 468.

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Charles W. Bunn and *Charles Donnelly,* for respondent.

The testimony shows that the carrier took ten days to haul these cars from Wapato to Minneapolis and that the schedule time of the train, in which such shipments are ordinarily moved, was only seven days; but it does not show within what time such shipments are ordinarily carried, nor does it show that there was ever an instance of a shipment having been delivered in less time than was taken for the delivery of the shipment involved in this action. Evidence that the time used exceeds that fixed in the schedule is not evidence of negligent delay. It is only unusual or unreasonable delay that, unexplained, gives rise to any presumption of negligence. Elliott, Railroads, § 1483. The evidence of the deviation from that schedule shown in this case is evidence of negligence properly submissible to the jury.

The contract was made in Washington and covered a shipment of goods from the state of Washington. R. L. 1905, § 2008, referred to in appellant's brief, has, therefore, nothing to do with it. The validity of a contract is determinable by the law of the state in which it was made. In the absence of any evidence of a statute to the contrary, that law will be presumed to be the common law. Mohr v. Miesen, 47 Minn. 228, and the question, therefore, is as to whether at common law the contract relied upon in this case is valid.

The doctrine that contracts are invalid which assume to release a common carrier from liability for negligence is not an absolute one. It is itself an exception to the broader rule that contracts made upon a sufficient consideration (and the sufficiency of the consideration is not questioned here) are to be respected as defining the rights of the parties. The reason which underlies the exception is that to recognize such contracts would be to countenance and encourage the carrier in the negligent performance of the duty which it owes to the public. Where this reason does not exist there is no ground for the application of the rule.

Not one of appellant's cases involves simply a claim for shrinkage in market value and a contract on the part of the shipper agreeing to forego any claim for damage for such shrinkage. The only case that we have been able to find involving an express agreement of this kind is the case of White v. Great Western, 2 C. B. (N. S.) 7. The contract in that case was very similar to, indeed almost identical with,

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the contract involved in the present case, and it was sustained and held to be a good defense to an action of this kind.

JAGGARD, J.

Plaintiff and appellant, a wholesale dealer in fruit, delivered at Wapato, Washington, certain fruit for transportation over defendant's line to Minneapolis, Minnesota, for delivery to plaintiff. It was stipulated: The fruit arrived ten days thereafter. The schedule time of the train in which such shipments were ordinarily moved was seven days. If the fruit had arrived within that time, plaintiff would have received $512 more than a sale at the wholesale market value at Minneapolis would have produced on the day on which the shipment actually arrived.

The only evidence offered in behalf of defendant was the bill of lading under which the shipments were made. The provision of that agreement here involved was as follows: "The corporation does not undertake to carry property by any particular train, nor in time for any particular market; nor will it be responsible for any loss or damage arising from delay, however occasioned, but will forward consignments with reasonable dispatch." The trial court directed a verdict for the defendant. This appeal was taken from an order denying plaintiff's motion for a new trial.

We are of the opinion that the trial court was right. There was no direct evidence of negligence. It is only unreasonable delay, unexplained, which gives rise to a presumption of negligence. Elliott, Railroads, § 1482.

In the case at bar the evidence fails to supply any standard of what is reasonable or usual dispatch. We take judicial notice of the facts that the distance between the points of shipment and of delivery was very great, and that the line of defendant's road crossed three mountain ranges and four states. This knowledge would not justify a court in holding that ten days was an unreasonable time for the carriage of that freight unless some evidence was introduced. Nor would proof that the time which elapsed between the receipt of shipment for transportation and delivery to consignee at destination exceeded the time fixed by schedule show negligence. No testimony to which our attention has been called was in fact offered which showed

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or tended to show that this train or any other train had ever in fact made its schedule time between these points, or that there was any known instance of a shipment having been carried and delivered in less than the ten days which were consumed in carrying and delivering the shipment in question. Plaintiff expressly assented to the provision of the contract that the corporation did not undertake to carry the property by any particular train, and did not undertake to show that, as a matter of fact, the shipments were put upon the first train leaving Washington, or that any demand thereunto was made, or that the train which carried them took more than the schedule time. It is to be noted in this connection, as the trial court pointed out, that the present case does not involve a deterioration in condition, which, perhaps, might affect the conclusion, if the damages sought to be recovered were based upon the depreciation in the quality of the fruit due to delay. It would have been an obvious perversion of the dictates of simple justice for the trial court under the circumstances to have submitted to the jury the question of defendant's negligence.

The authorities to which defendant refers us we have examined and considered. That they sustain some positions for which they are cited is as clear as it is certain that they wholly fail to hold that a common carrier may not make a valid contract whereby it refuses to undertake to carry property by any particular train and to forward consignments with reasonable dispatch. These provisions of the contract only are here involved. The agreements that the carrier does not undertake to carry property in time for any particular market, and that it will not be responsible for any damages or loss arising from delay whether valid or not (see Baltimore & O. S. Ry. Co. v. Voight, 176 U. S. 498, 502, 20 Sup. Ct. 385, 44 L. Ed. 560; 21 Harvard L. Rev. 32), are not material here. Defendant's authorities sustain the positions that a carrier is not responsible for negligence if it transports goods consigned to it for carriage to the point of destination within a reasonable time (Ormsby v. U. P. R. Co. (C. C.) 4 Fed. 706; Illinois v. Cobb, 72 Ill. 148; Bosley v. Baltimore, 54 W. Va. 563, 46 S. E. 613, 66 L. R. A. 871; Berje v. Texas, 37 La. An. 468), and that the valid portions of this contract are enforceable (Ormsby v. U. P. R. Co., supra)

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The plaintiff, we conclude, did not bear the burden of proof of showing that his goods had not been transported with reasonable dispatch under the circumstances.

Affirmed.

JOHN BAILEY v. GRAND FORKS LUMBER COMPANY.[1]

February 26, 1909.

Nos. 15,816—(83).

Contributory Negligence.

The plaintiff's minor son was injured by a jump saw while working in the defendant's sawmill. *Held:* The evidence does not show as a matter of law that the son was guilty of contributory negligence, or that he assumed the risks.

Request to Charge Jury.

The general rule is that the omission of the trial court to charge the jury upon a particular point is not error, unless the court is requested so to do. This case is within the rule.

Action in the district court for Polk county by John Bailey to recover $15,000 damages for personal injuries sustained by his minor son while employed by defendant. The case was tried before Watts, J., and a jury which returned a verdict in favor of plaintiff for $7,500. From an order denying its motion for a new trial, defendant appealed. Affirmed.

Skulason & Husband and *Howard T. Abbott,* for appellant.

J. A. Sorley, for respondent.

START, C. J.

Barney Bailey, hereinafter referred to as the plaintiff, a minor seventeen years old, was on July 9, 1907, injured while working for the defendant in its sawmill at East Grand Forks by his foot coming in contact with a saw. His father brought this action in the district court of the county of Polk to recover damages for the benefit of the son on account of such injury. Verdict for $7,500. The defendant appealed from an order denying its motion for a new trial.

[1] Reported in 119 N. W. 786.

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The assignments of error raise two general questions.

The first one is: Did the trial court err in denying the defendant's motion to dismiss the action when the plaintiff rested his case, and in denying its motion for a directed verdict at the conclusion of the evidence? The contention of the defendant is that the court did so err, for the reason that the evidence was not sufficient to establish the alleged negligence of the defendant, but that it did show that the plaintiff was guilty of negligence and assumed the risks.

The evidence in some material particulars is conflicting, but the record discloses evidence, responsive to the issues, tending to show these facts: The plaintiff was employed by the defendant in its sawmill, and was placed in charge of a jump saw used for cutting logs into shingle lengths. It was two and one half feet in diameter, and revolved in a box or platform fifty feet long, some three feet wide, and two feet high. The platform extended parallel with the wall and fifteen inches therefrom. The saw was raised and lowered through an opening in the platform by means of a lever. This opening, the original width of which was one and one fourth inches, was cut wider as the saw was used, so that it became and was from two and one half to four inches wide. This condition had existed some time, and was known to the defendant. Within about one foot of the wall side of the platform a plank two by ten was placed on edge to prevent logs from falling on the other side. The opening for the saw was cut through this plank. There was a conveyor underneath the saw to carry away the sawdust and pieces of logs. This would frequently clog up, and then it would become necessary for the plaintiff to go upon the top of the platform, immediately to the right of the opening for the saw, cross over on the other side of the plank, and poke in from the wall side of the platform to loosen the clogged condition. Immediately to the right of the opening through which the saw was raised was a plank sixteen inches wide, extending across the platform and beyond the plank on edge. This plank was split, and its side next to the wall was unsupported, and it would give way when stepped on. This condition had existed for such a length of time before the accident as to charge the defendant with notice of the defect, but it was unknown to the plaintiff prior to the time of his injury. At the time of his injury the plaintiff went upon the platform,

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to the place where he was required to go to clean out the refuse from the conveyor, looking for his pick which he used to hold the logs in place when cutting them. In returning, he stepped on that part of the plank to the right of the saw, which was loose. It gave way, and caused him to lose his balance, and, to save himself from falling through an open window upon the sill of which his right foot was resting, he threw out his left foot. It did not catch, but slipped into the opening through which the saw was raised, came in contact with the saw, which split his foot several inches above the ankle, so that it became necessary to amputate it.

This occurred thirty nine days after he was put in charge of the saw. He knew that, when the saw was lowered below the platform, it continued to revolve, and of the opening through which it was raised or lowered. He, however, testified that he did not know that the opening was wide enough to permit his foot to pass through it.

The negligence on the part of the defendant alleged in the complaint and relied upon at the trial was allowing the opening through which the saw revolved to become and remain so wide as to permit a person's foot to pass through it, and come in contact with the saw, and in allowing the plank in the platform near the opening to become and remain loose, so that it would give down when stepped upon. The answer was, in legal effect, a general denial. The contention of the defendant is that the verdict is not sustained by the evidence for the reason that the plaintiff was guilty of contributory negligence, and that he assumed the risks.

It is urged that it was not necessary for the plaintiff to go upon the platform and that he had been warned never to go upon it, and that its condition was dangerous, and that the dangers incident thereto, if any, were apparent and known to him. This assertion is not justified by the evidence, which shows that there was a necessity for the plaintiff to go upon the platform; that he frequently went there in the discharge of his duties. The plaintiff's testimony in this respect was corroborated by at least two other witnesses. Again, the evidence is far from conclusive that he was ever warned never to go upon the platform. The weight of the evidence was to the contrary. The plaintiff testified that he was not so warned. The defendant's foreman, a witness for it, testified that: "I told him that I wanted no fooling

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around there, and to keep off the platform, and not to be running around on the platform. That is all the talk I had with him. I didn't show him how to handle it because he told me he had worked there the year before. Q. But you told him not to go on the platform? A. Yes, sir; not to be playing around there." This falls far short of a direction never to go upon the platform for a necessary purpose connected with the operation of the saw. There was no evidence which would justify a finding that the plaintiff assumed the risk incident to the loose plank, for he had no knowledge of the defect until he was injured.

The claim that he assumed the risk of the danger of the unnecessarily wide opening in the platform through which the saw was raised and lowered rests solely upon the fact that he knew that the opening was there; but he testified that he had no knowledge that his foot would go through the opening, and did not know its width. It would seem to be doubtful in view of the plaintiff's age and experience, whether the fact that the plaintiff knew of the opening and that, if his foot was caught therein, he would be injured, would be sufficient to support a finding that he also appreciated the risk or liability of his foot being so caught. However this may be, it is clear that it cannot be held as a matter of law, notwithstanding his testimony to the contrary, that he knew and appreciated the risk of his foot being caught in the opening.

Our conclusion, based upon a consideration of the entire evidence, is that it does not show as a matter of law that the plaintiff was guilty of contributory negligence, or that he assumed the risks. It follows that the verdict is sustained by the evidence.

The only other ground for a new trial urged by the defendant is that the trial court erred "in failing to charge the jury on the doctrine of the assumption of risk." No issue was made by the pleadings as to the assumption of risks. The trial court was not requested to instruct the jury as to the doctrine of assumption of risks. The defendant's claim in moving for a directed verdict that the plaintiff assumed the risk was this: The "defendant renews its motion, and asks the court to direct a verdict in favor of defendant on the ground that there has been negligence conclusively shown on the part of the plaintiff in this case."

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Nor did the defendant at the trial or before making its motion for a new trial except in any manner to the failure of the court to so charge. The settled doctrine of this court is that, as a general rule, the omission of the trial court to charge the jury upon a particular point is not error, unless the court is requested so to do. McCarvel v. Phenix Ins. Co., 64 Minn. 193, 66 N. W. 367; Mobile Fruit & Trading Co. v. Potter, 78 Minn. 487, 81 N. W. 392; Ellington v. Great Northern Ry. Co., 92 Minn. 470, 100 N. W. 218; Coe v. Northern Pac. Ry. Co., 101 Minn. 12, 111 N. W. 651, 11 L. R. A. (N. S.) 228; State v. Zempel, 103 Minn. 428, 115 N. W. 275.

There are exceptions to the rule, but they are rare. Robertson v. Burton, 88 Minn. 151, 92 N. W. 538. In this exceptional case the court submitted to the jury certain of the issues, but omitted a material one, and instructed the jury that those submitted were the only ones to consider, and that the plaintiff was entitled to a verdict for some amount.

It is obvious that the instant case is within the general rule.

Order affirmed.

ARTHUR C. ANDREWS and Another v. NORTHWESTERN NATIONAL BANK.[1]

August 28, 1908.

Nos. 15,646—(186).[2]

Forged Indorsement—Liability of Drawer.

The appellants forwarded to their agent a check to be used in paying their debt to a customer. The agent forged the name of the payee, and deposited the check in a bank to his own credit. Being short in his account with his principals, the agent then paid to them a sum of money which included the proceeds of the forged check. The bank on which the check was drawn paid it on the forged indorsement. In an action by the drawers of the check against the bank, *held*, that inasmuch as the proceeds of the check came back to the drawers, and the debt of the

[1] Reported in 117 N. W. 621, 780, 122 N. W. 499.

[2] April, 1908, term calendar.

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agent remained unpaid, they had suffered no damage by reason of the payment of the check, and could not recover the amount thereof from the bank.

Action in the district court for Hennepin county to recover $926.72. The complaint alleged that plaintiffs' certain check upon defendant bank for that amount to the order of Z. W. Thomas was never presented for payment by Thomas nor did he ever indorse the same or order the same to be paid to any person whomsoever, but that the check was presented to defendant by some person other than Thomas and payment thereon demanded, and that defendant without the direction, order, knowledge or consent either of said Thomas or of plaintiffs paid the amount of the check to the person presenting it, and wrongfully charged the sum so paid by it against the account of plaintiffs and has refused to pay that sum to plaintiffs. The answer admitted the making of the check and that it was never presented to said bank for payment by said Thomas, but was presented by the First National Bank of Minneapolis through the Minneapolis Clearing House and paid in accordance with its rules and custom to the bank; that the amount of the check was charged to the account of the plaintiffs and upon subsequent demand for payment defendant refused to pay the same or any part thereof to plaintiffs. As a defense the answer alleged in substance the facts set forth in the second paragraph of the opinion and also: "That said check was never delivered to nor ever became the property of Z. W. Thomas, but remained and was the property of the plaintiffs in this case until so deposited in said State Bank of Berlin, and when so deposited by said P. T. Langdon to the account of P. T. Langdon & Co., in said State Bank of Berlin, the money paid therefor by said State Bank of Berlin and so kept on deposit in said bank always was the money and property of said plaintiffs; and that afterwards on or about the 27th day of October, 1905, said P. T. Langdon, at the request of plaintiffs, drew said money, towit," $926.72, "out of said bank, and paid the same over to said plaintiffs, and plaintiffs have ever since had, received, kept and retained said money and the whole thereof." The reply admitted a payment by Langdon but denied that it was made to plaintiffs for the money received upon their check or as the money of plaintiffs, and alleged it was paid to

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make good an indebtedness to plaintiffs for moneys misappropriated by him other than the check or its proceeds.

The case was tried upon a stipulation of facts and upon "evidence therein introduced by the plaintiffs," before Simpson, J., who ordered judgment in favor of defendant. From the judgment entered pursuant to the order, plaintiffs appealed. Affirmed.

Durment & Moore, for appellants.

When Langdon indorsed the check and transferred it to the Bank of Berlin that bank could either (1) sue him on his contract of indorsement or (2) revoke the credit. When the check was transferred to the Bank of Crystal Lake that bank could (1) sue the Berlin bank on its contract of guaranty or indorsement, or (2) sue Langdon on his contract of indorsement, or (3) recover the money from the Berlin bank as money paid under mistake or for which the consideration had failed, if it had paid money, or (4) revoke the credit, if it did not pay money but gave credit. When the check was transferred to the Mankato bank, that bank then would have the same remedies against the Berlin bank and Langdon that the Bank of Crystal Lake had, or (3) it could sue the Bank of Crystal Lake on its contract of indorsement, or (4) recover the money from the Bank of Crystal Lake as money paid under mistake or for which the consideration had failed, if it had paid money. The Mankato bank and the First National Bank of Minneapolis would have similar remedies against prior indorsers of the check.

The foregoing analysis of the transaction makes clear these things: (1) It does not appear that the defendant ever paid any money to any one on account of this check. So far as appears, the defendant, instead of paying the Minneapolis bank money, may have given it credit for the amount of the check on a balance owed to it by the Minneapolis bank. In this event, to deny plaintiffs the right to recover in this action is to allow the defendant to take plaintiffs' money to pay the debt which the Minneapolis bank owed to defendant. (2) In no event did plaintiffs get any of defendant's money. If defendant in fact paid money, it paid it to the Minneapolis bank. The Minneapolis bank did not pass the money back to the prior indorsers, because it had not taken the check for collection, but had bought it and

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paid for it, either in money or by credit, before it passed the check to the defendant. The defendant had no remedy against the Mankato bank, the Lake Crystal bank or the Berlin bank, to recover the money as money paid by it under mistake or for which the consideration failed. As against these its only remedy was on the contract of indorsement. Consequently, the money which plaintiffs got from the Bank of Berlin was not defendant's money, and inasmuch as neither the plaintiffs nor any one to whom they directed the money to be paid got defendant's money, the defendant had no right to take credit for it in plaintiffs' account; and, inasmuch as plaintiffs were under no contract to repay the money or to protect defendant in the transaction, nor in any way privy to the indorsements on the strength of which defendant paid the check, defendant has no cause of action which it can offset to plaintiffs' demand. (3) The plaintiffs were not parties to the transaction of negotiating the check or getting the money on it. No one connected with the transaction, from Langdon and the Bank of Berlin down to and including defendant, had any remedy or right of action of any sort against the plaintiffs growing out of that transaction. The defendant paid the check October 9. On October 27 Langdon drew his check for plaintiffs on the Bank of Berlin, not for anything connected with the check bearing the forged indorsement, nor the money received on it, but in payment of a debt he owed plaintiffs. The Bank of Berlin, on October 27, gave plaintiffs credit for this check given by Langdon to plaintiffs and charged it to Langdon's account. Subsequent to October 27 the Bank of Berlin paid plaintiffs the money for the credit it gave them on that day. It thus appears that the only person connected with the transaction who could by any possibility assert a claim against the plaintiffs is the Bank of Berlin, and that cause of action would be based upon a transaction to which defendant was not privy and with which it had no connection whatever.

It is clear that defendant cannot in this action assert the rights of the Bank of Berlin. But if it were otherwise, still the judgment would have to be reversed. On the facts found by the trial court the Bank of Berlin could not recover any part of the money it paid to plaintiffs.

Why should plaintiffs be required to take Langdon for their debtor instead of the defendant? Langdon wrongfully, as against plaintiffs,

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forged the name of the payee to the check; defendant wrongfully, as against the plaintiffs, paid the check to a person other than the one plaintiffs directed it to be paid to. Plaintiffs were not responsible for either act. Why should one of the wrongdoers be permitted to say to plaintiffs: "You must look to the other and not to me?" Langdon was indebted to the defendant on his indorsement of the check. Why should plaintiffs instead of defendant be relegated to a lawsuit against Langdon, when defendant's right of action against Langdon is the clearer?

What right had the defendant to pay its debt to plaintiffs through the medium of the Bank of Berlin, and under the false statement and with the understanding of plaintiffs that it was paid by another than defendant and on account of an indebtedness other than defendant's? Yet, in effect, the decision of the trial court is that it has such right. Ordinarily, it would be considered plain fraud. The plaintiffs had the right to direct how payments should be made for their account, and cannot lawfully be required to recognize any such payment as this.

Where one has received money, in payment of an existing debt, from one who has procured that money from a third person by forgery or other fraud, and the one who has so received it in payment of the existing debt had no knowledge that the money had been obtained by means of forgery or fraud, the third person from whom it was so obtained cannot recover it from the person to whom it was paid on the existing debt, nor compel that person to account for it. Lime Rock v. Plimpton, 17 Pick. 159; Merchants v. Abbott, 131 Mass. 397; Moore v. Moore, 127 Mass. 22; Le Breton v. Peirce, 2 Allen, 8; Stephens v. Board, 79 N. Y. 183, 187; Newhall v. Wyatt, 139 N. Y. 452, 454; Nassau v. National, 159 N. Y. 456; Baltimore v. Burke, 102 Va. 643; Tanner v. Lee, 121 Ga. 523, 525; Burnham v. Holt, 14 N. H. 367; Dwinel v. Sawyer, 53 Me. 24; Young v. Dibrel, 26 Tenn. 270.

Koon, Whelan & Bennett, Koon, Whelan & Hemstead, and *Lancaster & McGee,* for respondent.

ELLIOTT, J.

This action was brought by Andrews & Gage, the appellants, against the Northwestern National Bank to recover the sum of $926.72

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which the bank charged against their account because of the cashing of a check upon which the name of the payee was forged.

The parties stipulated, and the court found, in substance:

That Andrews & Gage were engaged in the grain and grain elevator business in the state of Minnesota, and during the time covered by the transaction in question operated an elevator for the purchase, handling, and storage of grain at Berlin, North Dakota. That during said time and until about October 27, 1905, one P. T. Langdon was an employee and agent of Andrews & Gage at Berlin in charge of their elevators there, and as such employee and agent engaged in purchasing, storing, and shipping wheat and other grain at Berlin. That Langdon had power and authority from Andrews & Gage to purchase wheat and other grain from the farmers in the vicinity of Berlin, and to store it in the elevators and ship it to Andrews & Gage at Minneapolis and other markets, and pay for or make advances on the grain so purchased with money furnished by Andrews & Gage for that purpose, or by delivering to the vendor of such grain the checks of Andrews & Gage furnished to him by them for that purpose. But he had no authority to sign or indorse any check made by, or on behalf of, Andrews & Gage, nor to indorse any draft made by or upon them, nor to sign drafts on their behalf in the course of the business or otherwise.

On or about September 23, 1905, Andrews & Gage made a certain check for $926.72 payable to Z. W. Thomas or order. This check was drawn upon the Northwestern National Bank at Minneapolis, and was mailed by Andrews & Gage to Langdon at Berlin, North Dakota, with instructions to deliver it to Z. W. Thomas if it was then due and owing to him for grain theretofore received by Andrews & Gage from him. Langdon received the check with the instructions, but, instead of delivering the check to Thomas, he, without the knowledge or consent of Andrews & Gage, on October 6, 1905, presented it to the State Bank at Berlin, North Dakota. Before such presentation, Langdon, without any authority, indorsed the name of Z. W. Thomas on the back of the check. At the request of Langdon, the State Bank of Berlin then placed the amount of the check to the credit of an account then opened by Langdon in that bank in the name of P. T. Langdon & Co. The State Bank of Berlin took the check, and credited the

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amount thereof to P. T. Langdon under the name of P. T. Langdon & Co. There was no firm or partnership or corporation of that name, and the name was assumed by Langdon for the purpose of that account only. Thereafter, on October 17, 1905, Langdon deposited the further sum of $380.25 in the account. No other deposits were made to the credit of that account. Thomas never received any of the proceeds of the check.

The State Bank of Berlin after receiving the check indorsed the same, "Pay any bank or banker or order, prior indorsements guaranteed, State Bank of Berlin, Berlin, North Dakota, F. F. McGuire, Cashier," and delivered it to the First National Bank of Crystal Lake, Minnesota, and received from the bank either in cash or credit the amount of the check. That bank delivered the check to the National Citizens' Bank of Mankato with a similar indorsement, except the words, "Prior indorsements guaranteed," and received from it the amount of the check either in cash or credit. The National Citizens' Bank of Mankato delivered the check to the First National Bank of Minneapolis with a similar indorsement, and received from it the amount of the check in cash or credit. The First National Bank of Minneapolis presented the check for payment to the Minneapolis Clearing House on October 9, 1905, and the Northwestern National Bank received the check through the clearing house in the usual method, and paid to the First National Bank of Minneapolis the amount thereof either in cash or in credit, and charged the amount of the check upon its books to the account of Andrews & Gage.

The State Bank of Berlin on October 6, 1905, received the check, supposing and believing that the indorsement thereon was a valid and proper one, and neither the First National Bank of Lake Crystal, the National Citizens' Bank of Mankato, the First National Bank of Minneapolis, nor the respondent, the Northwestern National Bank, had any knowledge that the first indorsement on the check was not genuine, valid, and proper until on or about May 17, 1906. Each and all of these banks received, accepted, and paid the check in the ordinary and usual course of business, and without any knowledge that the indorsement of the name of Thomas was not genuine and properly authorized. The State Bank of Berlin learned that it was not the genuine indorsement of Thomas on or about October 27, 1905. The account opened

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with the State Bank of Berlin by P. T. Langdon in the name of P. T. Langdon & Co. was not opened under the direction or with the knowledge of Andrews & Gage.

On October 27, 1905, Andrews & Gage demanded of Langdon certain moneys which they asserted he should account for. He thereupon informed them that it was in the bank to their credit, except about $79, which he then paid, and handed to them a bank pass book of the State Bank of Berlin in their name, showing that Andrews & Gage had to their credit in that bank the sum of $1,003.01. The fact was that, although not then known to Andrews & Gage, Langdon had on the same day drawn a check for $1,003.01 on the P. T. Langdon & Co. account, and had it credited to the account of Andrews & Gage in said bank and charged against the account of P. T. Langdon & Co. When Andrews & Gage received this bank book showing that they had a credit of $1,003.01 at the State Bank of Berlin, they were not aware that it was to any extent the proceeds of the Thomas check. On November 9 Langdon withdrew the balance left to the account of P. T. Langdon & Co. from the State Bank of Berlin. After receiving the bank book, Andrews & Gage made other deposits in the account so opened in their name by Langdon, and prior to January 1, 1906, checked out of said account all the moneys so deposited by them and by Langdon. The check of $1,003.01 was given by Langdon to Andrews & Gage in settlement of a shortage known on October 27, 1905, and for no other purpose and upon no other consideration. Shortly prior to October 27, 1905, Andrews & Gage were informed by Thomas that he had not received the check in question, nor indorsed the same. At that time they had the check with all the indorsements thereon in their possession. Prior to the delivery of the bank pass book to Andrews & Gage, Langdon stated to them that he was the agent of Thomas, and had authority to indorse the check. The sum of $1,003.01 owed by Langdon to Andrews & Gage was in addition to, and exclusive of, any liability on his part to the firm for said check or the money received from it.

Upon these facts the trial court found that Andrews & Gage were not entitled to recover the amount of the check from the Northwestern

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National Bank, and the correctness of this conclusion is the only question involved upon this appeal.

The facts present a rather unusual condition of affairs, but we are satisfied that the court reached the proper conclusion. The appellants contend that as depositors they were creditors of the Northwestern National Bank to the extent of their balance therein, and entitled to disregard any charge made against their account which was not authorized by them or made by reason of their negligence or other misconduct. The correctness of this general proposition cannot be questioned, but nevertheless Andrews & Gage are not in a position to require the Northwestern National Bank to credit their account with the amount of this check. The appellants make an ingenious argument, but the result which they desire to bring about would be so unjust and inequitable as to suggest that a fallacy lurks somewhere in the process of reasoning. The appellants have not been injured by the fact that the Northwestern National Bank paid this check upon a forged indorsement, and their theory, if accepted, would merely result in substituting the bank for the defaulting employee as the creditor [debtor] of Andrews & Gage. The check for $926.72 came into Langdon's hands on October 6, 1905, and with it he opened an account with the State Bank of Berlin in the name of P. T. Langdon & Co. Ten days later he deposited an additional sum of $380.25 in the account, making a total of $1,306.97. On October 27, 1905, he drew a check on the account of P. T. Langdon & Co. for the sum of $1,003.01, and deposited it in another account in the same bank in the name of Andrews & Gage.

The result of all this juggling was that the $926,72, the proceeds of the check with the forged indorsement, and an additional $76.29 from some other source, went into the new Andrews & Gage account. Langdon was then short in his accounts with his employers, Andrews & Gage, and when on October 27, 1905, they made a demand on him for a settlement, he responded by turning over to them the account in the State Bank of Berlin which he had evidently created for that purpose. That is, Langdon was short in his accounts, and had no money with which to pay. The check for $926.72 which was delivered to him by Andrews & Gage to be used in paying Thomas was in effect cashed by him. With the proceeds which still belonged to Andrews &

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Gage or to the Northwestern National Bank, Langdon assumed to pay his debt to Andrews & Gage. It does not appear that at that time Thomas was entitled to the check, and it was sent to Langdon for delivery to Thomas upon certain conditions. If Langdon had forged the indorsement and himself presented the check to the Northwestern National Bank and secured the cash, carried it to the office of Andrews & Gage, and handed it to them in settlement of his shortage, the situation in legal effect would have been identically the same as at present. Andrews & Gage could have put the money in the bank. They would have had Thomas' wheat, and still owed him for the same. The forged check would have been where it now is, Langdon would still have been short in his accounts, and the net result of the entire transaction would have been the liability of Langdon for prosecution for forgery.

We cannot see that the fact that this business was transacted by the use of credits, instead of the handling of actual cash, makes any difference so far as the liability of the Northwestern National Bank is concerned. It paid the check upon a forged indorsement, and thereby became liable to its depositor for any damages thereby sustained by him. If the depositor lost nothing, he should recover nothing. If a forged check for $100 on B.'s account is paid to A., and A. immediately on being caught hands the money back to B., it would not be claimed that B. could sue the bank and recover the $100 which had been wrongfully charged to his account. Again, suppose A. in the employ of B. owes B. $100 which B. cannot collect. A. is given a check on the bank payable to D., with instructions to deliver it to D. Instead of doing so, he forges the payee's name, draws the money from the bank, and with it pays his debt to B., and receives a receipt in full. Can B. collect $100 from the bank? If so, it would be quite easy for A. and B. to arrange for the bank to pay A.'s debt to B., leaving B.'s account unimpaired. Of course, A. might take some chances of criminal prosecution, but Langdon was willing to assume the chances in this instance in order to square his account with his employers.

The result of the entire transaction is that the money started with Andrews & Gage, and, after passing around the circle, came back to them. The fact that credits, instead of cash were used, does not change the legal effect. Langdon's debt to them is to that effect un-

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paid. There is nothing in this record which shows that the appellants were damaged; and the order of the trial court is therefore affirmed.

LEWIS, J.

The mere fact that appellants received the proceeds of the check from Langdon would not prevent recovery. If appellants had been misled and had lost an opportunity to otherwise collect their claim from Langdon, then in my judgment the defense here urged would not be tenable.

But I concur in the view that appellants cannot recover unless they were damaged as a result of the transaction, and that no damage has been shown. Although the court found that appellants had no knowledge or information that the money received from Langdon was to any extent the proceeds of the check, yet the court also found that they had the check with all the indorsements in their possession, and knew that Thomas had never received it, and had not indorsed it, and that Langdon had indorsed it, claiming to be the agent of Thomas. It seems reasonably clear that appellants were in possession of all of the facts, and could readily have ascertained by an examination of the bank book that the money paid them by Langdon was the proceeds of the check. If appellants knew that Langdon had forged Thomas' name, and had drawn the money on the check from the local bank, they had every reason for believing that the money placed to their account in the pass book was that identical money. In receiving the money thus paid out by the local bank, appellants ratified the indorsement, and consented to its collection from the bank upon which the check was drawn.

I concur in the result.

On October 2, 1908, the following order was filed:

PER CURIAM.

In a petition for reargument the point is made that when Langdon drew the $1,003.01 from the account of $1,306.97, which stood in the name of P. T. Langdon & Co., he must be presumed to have drawn $380.25 of his own money and only that portion of the remainder made up of the $926.72 check which was necessary to make the total of $1,003.01, and that therefore Andrews & Gage received back but a part

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of the proceeds of the check. If this is the correct view, Andrews & Gage received back but $622.75 of the $926.72, and should recover the balance of $303.97 from the bank. A reargument on briefs is granted on this question only.

On February 26, 1909, the following opinion was filed:

PER CURIAM.

A reargument upon this issue was granted in this case and briefs were duly filed by the parties. After considering the matter fully, we find no reason for changing the decision heretofore filed in this case and the same is hereby adhered to.

JOHN BAILEY v. GRAND FORKS LUMBER COMPANY.[1]

February 26, 1909.

Nos. 15,858—(210).

Verdict—Evidence.

Held in this, a personal injury action, that the evidence sustains the verdict for the plaintiff, and that the trial court made no prejudicial error either in charging the jury or in ruling upon the admissibility of evidence.

Action in the district court for Polk county to recover $1,800 for loss of services of plaintiff's minor son who was injured while employed in defendant's saw mill. The case was tried before Watts, J., and a jury which returned a verdict in favor of plaintiff for $900. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Charles Loring and *Bangs, Cooley & Hamilton,* for appellant.

J. A. Sorley, for respondent.

START, C. J.

This action is the sequel of the case of Bailey v. Grand Forks Lumber Co., supra, page 192, 119 N. W. 786, and was brought to recover

[1] Reported in 119 N. W. 787.

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for loss of services of the plaintiff's minor son, Barney, by reason of his injury due to the alleged negligence of the defendant. Verdict for the plaintiff for $900. The defendant appealed from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

The defendant here contends that there was no evidence to justify the submission of the case to the jury. The allegations of negligence and the evidence in this case are substantially the same as in the case cited, which was an action to recover damages for the benefit of the son on account of his injuries by reason of the same accident and alleged negligence involved in this case. While the evidence in each case is not in all particulars the same, yet it is sufficiently so as to make unnecessary any statement of the facts herein, and reference is here made to the opinion in the case cited for a statement of facts which the evidence herein tends to show.

The reason urged by the defendant why the verdict is not sustained by the evidence is because it fails to show any negligence on the part of the defendant, and, further, that it conclusively shows that the plaintiff's son was guilty of contributory negligence, and assumed the risk. The question whether the son was guilty of contributory negligence and assumed the risks was urged in his case, and we held that it was a question of fact under the evidence. The evidence on this question was substantially the same in each case, and we hold in this case that the question was one of fact for the jury. The defendant further urges that it was guilty of no actionable negligence "for the reason that Barney, at the time of his injury, was using the top of the saw box for a purpose for which it was never intended to be used, that he was at the time acting without the scope of his employment, and that the defendant could not reasonably have anticipated that any injury whatever would or could happen to Barney, or to any other person, from the alleged defects."

This question was not urged in the son's case, and was not directly decided. We have considered the evidence with particular reference to this question, and have reached the conclusion that the evidence was sufficient to sustain a finding by the jury to the effect that the son was within the scope of his employment when injured; that the defendant in the exercise of due care for the safety of its employees ought to have

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anticipated that injury might result to them by reason of the unnecessarily wide opening through which the saw was raised and lowered, and the defects in the platform; and, further, that the verdict is sustained by the evidence.

The plaintiff as a witness on his own behalf testified without objection with reference to his son's ability to do manual labor, as follows: "Since he was injured he has done practically nothing except to go to school after he got the artificial limb. He has not been able to do any manual labor. I think he was in the garden one or two evenings, and worked a little while. He has not been fitted to do any kind of work." He was then asked the question: "To what extent do you think his ability to perform manual labor has been impaired?" The defendant objected to the question because it called for a conclusion which the witness was not competent to testify to. Objection was overruled, and the witness answered: "I think probably eighty per cent." It appears from the record that his estimate of disability related to the then present time, and, further, that no claim is made that the award of damages is excessive. If it be conceded that the ruling was wrong, it was not reversible error for the undisputed competent evidence shows that the boy was then, and would continue to be during his minority, a matter of two years, practically unable successfully to do manual labor.

The only other alleged error relied on is that the court erred in giving the following instructions: "The defendant has presented to the court a great many statements of law, which it asks the court to give to the jury as being correct statements of law. They are repetitions, very largely, with slight variations; but it is claimed by defendant that they have a bearing upon the facts as they might be found by the jury from the evidence in the case. The plaintiff does not object to their being given; in fact, expressly waives any objection to any of them, so I will give you these statements of law." The court gave the requested instructions as a part of his general charge. It is claimed that this was prejudicial and comes within the rule of Fitzgerald v. St. Paul, M. & M. Ry. Co., 29 Minn. 336, 13 N. W. 168, 43 Am. 212.

Some of the requested instructions were in substance repetitions, and others were general statements of the law relating to master and servant. The trial judge might well have refused them and instructed

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the jury in his own language, concisely and concretely. It is to be noted that he expressed no opinion that they were not the law, as was done in the Fitzgerald case. The charge, taken as a whole, was quite as favorable to the defendant as it was entitled to have it, and the court did not err to its prejudice.

Order affirmed.

LILLIAN BURCH v. J. I. BERNARD.[1]

February 26, 1909.

Nos. 15,951—(200).

Slander—Directed Verdict.

In an action for damages for slander, it is *held* that under the evidence the court was justified in instructing the jury in substance that, if the words as alleged were spoken by the defendant, the plaintiff was entitled to a verdict for some amount.

Evidence.

There was no evidence that the words were true, or that they were privileged, or that there was any justification for their use.

Privileged Communication.

To give words a privileged character, it must appear that they were spoken in the discharge of some public or private duty, legal or moral, and with that end or purpose in view, or in the conduct of some matter involving his own interests, and for the protection of such interests, that they were relevant and proper in that connection, and that they were uttered in good faith and in the honest belief that they were true.

Privilege of Public Officer.

A member of a city council is protected from responsibility for words used on a proper occasion which are pertinent to any proper inquiry or investigation pending before the council, but he has no privilege to wander from the subject and wantonly assail the character of an individual.

Damages.

In an action for damages for slander, the financial standing of the defendant may be shown for the purpose of affecting compensatory damages.

Action in the district court for Pipestone county to recover $5,000 for slander. The case was tried before P. E. Brown, J., and a jury

[1] Reported in 120 N. W. 33.

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which returned a verdict in favor of plaintiff for $1,875. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, he appealed. Affirmed.

Morgan & Meighen, for appellant.

P. P. Cady, for respondent.

ELLIOTT, J.

The respondent, Lillian Burch, an unmarried woman nineteen years of age, who resided with her parents at Pipestone, Minnesota, was during the month of December, 1907, employed by the city authorities to nurse a young woman who was afflicted with the smallpox and quarantined in a building provided for that purpose. On January 13, 1908, Miss Burch presented a bill for her services to the city council, and while the question of the payment of the bill was under consideration by the council the appellant, J. I. Bernard, who was a member of the council, made the statement, in rough and offensive language, that "there was no smallpox there and that they were running nothing but a damn whorehouse." He had made the same statement on the public street before the meeting of the council, and had been warned by a bystander that he had no right to talk that way about Miss Burch, but kept on talking about the place and insisting that it was not run right—"that there was fellows there visiting them." Miss Burch brought this action against Bernard to recover damages for slander, and recovered a verdict of $1,875. The appeal is from an order denying the defendant's motion for a new trial. It is contended that the verdict is excessive, and that the court erred in receiving testimony over the objection of the defendant, and in instructing the jury.

1. The language alleged and found by the jury to have been used was actionable per se, and malice was therefore presumed. There was also evidence from which actual malice might be found, and the jury was justified in awarding punitive damages. Sneve v. Lunder, 100 Minn. 5, 110 N. W. 99; Hewett v. Pioneer-Press Co., 23 Minn. 178, 180, 23 Am. 680.

It is conceded that the language was not absolutely privileged, and the court charged the jury that there was no evidence that the words were true, or that they were privileged, or that the defendant had probable cause to believe they were true. We think that, as the evidence

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stood, the instruction was correct. The defendant was a member of the city council, and protected from responsibility for statements made on a proper occasion which were pertinent to any inquiry or investigation pending before the council; but he had no privilege to wander from the subject and wantonly assail the respondent. As said by the court in Quinn v. Scott, 22 Minn. 456, to give words this privileged character, "it must appear that they were spoken by defendant in the discharge of some public or private duty, legal or moral, and with that end and purpose in view, * * * and that they were spoken for the protection of such interests, and were relevant and proper in that connection. It must also appear that they were uttered in good faith and in the honest belief that they were true." Lowry v. Vedder, 40 Minn. 475, 42 N. W. 542; Landon v. Watkins, 61 Minn. 137, 63 N. W. 615; Traynor v. Sielaff, 62 Minn. 420, 64 N. W. 915; Trebby v. Transcript Pub. Co., 74 Minn. 84, 76 N. W. 961, 73 Am. St. 330; Nord v. Grey, 80 Minn. 143, 82 N. W. 1082; Callahan v. Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. 583; Sullivan v. Strathan, 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859.

The evidence wholly failed to show that Bernard spoke the words in the honest belief that they were true. It appeared very clearly that he acted in reckless disregard of the consequences to the young woman. The defendant's denial of having used the words charged was not very specific; but he was very certain that, even if he did use them he did not believe that they were true. On cross-examination he testified as follows:

"Q. Now, you believed that there was no smallpox there? A. Well, I did believe it at the time. Q. You believed that it was nothing but a damn whorehouse, didn't you? A. No; I didn't say it. I didn't believe it. Q. I say, if you said it, you believed it? A. I said their actions was more like— * * * Q. * * * Now, I say, if you stated to the council then it was nothing but a damn whorehouse, you believed it, didn't you? A. No; I didn't believe it. Q. Then, if you said it, you didn't believe it anyway? A. I didn't know it was a whorehouse. Q. Then, if you did say it, you didn't believe it that it was a whorehouse? A. I said their actions was acting more like it. Q. Answer my question, please. A. I said, 'No.' Q. (question read). What is your answer to that? A. I said, 'No; that I didn't know it.' * * * Q.

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Where you used a vulgar expression following it by saying that it was nothing but a whorehouse? A. I don't think I did it. Q. You didn't make such a remark? A. I don't think I did. Q. Now, if you made that remark, as testified to by Mr. Redmond, did you believe it? A. No; I didn't believe it. Q. No; you didn't believe there was any whorehouse there, did you? A. No, sir. Q. You didn't believe that this plaintiff and that other girl was conducting one there did you? A. I didn't know who was in there. Q. You didn't believe it, then, that they were running one, did you? A. No, sir."

See Quinn v. Scott, supra. The witness Brown testified that on the day of the council meeting he met Bernard on the street, and that Bernard then stated that the pesthouse out there was just a public whorehouse; that he told Bernard that he had no right to talk that way about Miss Burch, but that he went on talking about the place and the way it was conducted. Bernard testified that Brown might have made the statement to him, but that he did not hear the name of Miss Burch used. This occurred before the council meeting, and the evidence was properly received on the issue of the defendant's good faith. Miller v. Cook, 124 Ind. 101, 24 N. E. 577. With the evidence in this condition, the trial court properly instructed the jury that, if they found that the defendant used the words as charged, they had nothing to do but assess the damages.

2. Certain incompetent evidence was received, and subsequently stricken out. In view of the nature of the testimony, the error in receiving it was cured, and was therefore without prejudice to the defendant. State v. Towers, 106 Minn. 105, 118 N. W. 361; Juergens v. Thom, 39 Minn. 458, 40 N. W. 559.

3. A more serious question is raised by the ruling which permitted the defendant to be cross-examined as to the transfer of certain real estate, for the purpose, evidently, of showing that he was conscious of having done something which might bring trouble upon him. But no such purpose was stated, and, if the evidence was admissible for any purpose, it was properly received. The question is not free from doubt; but in view of the rule which permits the financial condition of the defendant to be shown, in an action of this character, on the issue of compensatory damages, we think that no prejudicial error was committed. Miller v. Cook, supra; Carpenter v. Hamilton, 185 Mo. 603,

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84 S. W. 863; Kidder v. Bacon, 74 Vt. 263, 52 Atl. 322; 18 Am. & Eng. Enc. (2d Ed.) 1096; Jones, Ev. (2d Ed.) § 160.

4. We cannot say that the damages were so excessive as to show passion and prejudice.

Order affirmed.

MABEL ABEL v. HARDWOOD MANUFACTURING COMPANY.[1]

February 26, 1909.

Nos. 15,956—(186).

Fencing Dangerous Machinery.

The bag-turning machine, which forms the subject of this action, is within the statute which requires dangerous machinery to be guarded.

Contributory Negligence.

Respondent was an operator on such a machine, and had been carefully instructed not to clean any part of it while in operation. She was injured while attempting to pick up a cleaning cloth from the floor for the purpose of replacing it on the frame. *Held*, respondent was not necessarily guilty of contributory negligence.

Action in the district court for Hennepin county to recover $5,000 damages for personal injuries sustained while working in defendant's shop. The allegations of the complaint were denied by the answer. The evidence indicated that the cylinder referred to in the opinion was five inches in diameter, that about two inches of it was below the frame of the table, while the wall of the cylinder was an inch in thickness, and that it was five inches from the outside of the table to the cylinder. The case was tried before Holt, J., who denied a motion to direct a verdict for plaintiff and a similar motion in behalf of defendant. The jury returned a verdict in favor of plaintiff for $2,500. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Brown, Albert & Guesmer, for appellant.

Larrabee & Davies, for respondent.

[1] Reported in 120 N. W. 359, 121 N. W. 916.

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LEWIS, J.

Respondent was injured by having her hand caught in the plunger under the framework of a bag-turning machine in appellant's factory. The machine consisted of an iron framework about as high as an ordinary table, which contained an apparatus designed to turn flour sacks from the wrong to the right side. In the performance of her duties she was required to stand at one end of the table, and feed the open end of the bags upon certain arms or flies. The frame of the machine was open, and underneath, at the top, was located certain machinery, among which was what is known as a "plunger," consisting of an iron rod which played back and forth in the end of a cylinder. This plunger was fastened about five inches back from the front side, and projected an inch or two below the upper portion of the frame. According to the rules and custom of the factory, the machinery was stopped fifteen minutes before the closing hour of the day for the express purpose of permitting the operators to wipe the different parts of the machines and clean the tables and floors. The operators used one of the sacks for a cleaning cloth, and, when it was not in use, it was the common practice to hang it on the lower part of the framework at the foot of the machines. Just before the accident, respondent was walking back and forth in the aisle, in front of the machine, resting herself, and waiting for a fresh supply of bags, when she noticed that the cleaning cloth had fallen to the floor. She stooped, picked it up with her right hand, and was in the act of transferring it to her left hand for the purpose of replacing it, when she slipped, and in an effort to save herself from falling involuntarily threw up her left arm, and the hand came in contact with the plunger.

1. It has been held by this court in many cases that the statute requiring dangerous machinery to be guarded is remedial, and should be liberally construed, and, where reasonable men might differ about the practicability to guard, it becomes a question of fact for the jury. The evidence in this case is sufficient to sustain a finding that the machinery located under the table within the framework, although somewhat out of the way, was nevertheless dangerous, and that it was practicable to place a screen or guard in front of it. It is the purpose of the statute to guard against accidents, although the precise manner in which they occur may not have been anticipated. Christianson v.

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Northwestern Compo-Board Co., 83 Minn. 25, 85 N. W. 826, 85 Am. St. 440.

2. At the argument, as well as in the brief, appellant laid great stress upon the fact that it was the universal custom that operators should never, under any circumstances, attempt to clean the machinery while it was in motion, and that respondent had been thoroughly instructed upon this point. The evidence is ample on that question. Respondent had been thoroughly instructed, and she understood that she was not under any circumstances to attempt to clean the machine while it was in operation. But she was not attempting to clean the machine when injured, according to her story. She was walking in the aisle, or alley, in front of the machine, for the purpose of recreation while she was waiting for another supply of sacks, and the accident occurred while she was endeavoring to pick up the cleaning bag from the floor, and putting it in its customary place on the lower part of the framework. Admitting, therefore, that she understood and appreciated the risk of attempting to use the cleaning bag in and about the machine while it was in operation, it does not conclusively follow that in trying to pick it up from the floor for the purpose of replacing it she was violating the rules or her instructions. Perhaps a more cautious person might not have attempted to do it in the same manner, but there is nothing incredible in her statement. She was in a stooping posture, the plunger was within her reach under the table, the jury examined the premises and the machine, and heard her testimony, and under proper instructions passed upon the question whether or not she was guilty of contributory negligence.

We discover no errors in the rulings of the court with respect to the evidence, instructions, and requests.

Affirmed.

BROWN, J. (dissenting).

I am unable to concur in the conclusion that defendant's failure to guard the "plunger" from which plaintiff received her injury further than it was guarded and protected was actionable negligence. The instrumentality was located immediately underneath the table at which plaintiff was at work, but not in a position to endanger her safety or the safety of others there engaged or those moving about the work-

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shop. The table was constructed on a pattern with ordinary tables, with a level surface and side running boards. The "plunger" was immediately under the top surface of the table and between the side boards, and sufficiently protected from contact by employees.

ELLIOTT, J.

I concur in the dissent.

On July 6, 1909, the following opinion was filed:

PER CURIAM.

This action having been fully reconsidered on reargument, it is ordered that the original decision herein be adhered to.

EDWARD W. EWING v. ALPHEUS B. STICKNEY and Another.[1]

February 26, 1909.

Nos. 15,960—(241).

New Trial—Verdict Influenced by Prejudice.

The plaintiff was injured while in the employ of the defendants as a yard switchman, and recovered in this action $9,125 damages on account of his injuries. The trial court granted a new trial unless the plaintiff consented to reduce his verdict to $7,000. He did so, and defendants appealed. *Held*, where the award of damages is so excessive as to indicate that they were given under the influence of passion or prejudice, and the circumstances are such as to show a fair probability that the jury were influenced by the same passion or prejudice in determining other issues that induced them to give excessive damages, a new trial should be granted absolutely.

Same—Excessive Damages.

In view of the excessive damages and the newly discovered evidence, the trial court should have granted a new trial absolutely, instead of reducing the damages.

Action in the district court for Ramsey county against the receivers of the Chicago Great Western Railway Company to recover $25,000

[1] Reported in 119 N. W. 802.

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damages for personal injuries while plaintiff was in their employ. The case was tried before Orr, J., and a jury which returned a verdict in favor of plaintiff for $9,125. The court granted an order for a new trial, unless plaintiff filed his consent to a reduction of the verdict to $7,000. Plaintiff consented to the reduction and defendants appealed from the order. Reversed and new trial granted.

A. G. Briggs, W. J. Ainsworth, and *T. P. McNamara,* for appellants.

T. D. Sheehan, for respondent.

START, C. J.

The plaintiff, on the morning of January 12, 1908, entered the service of the defendants as a yard switchman in their yards at Clarion, Iowa. He was twenty five years old. On the night of the same day he was injured by reason of a defective engine and the negligence of the engineer operating it, who suddenly reversed the engine, thereby jerking the car on which the plaintiff was riding, throwing him therefrom, and causing his left hand to come in contact with the track and beneath the wheels of a car. His left hand was so crushed by the wheels that it was necessary to amputate the first and second fingers about an inch above the knuckle, and the hand was otherwise injured, so that for manual labor it will be of no practical use. This action was brought in the district court of the county of Ramsey to recover damages on account of such injuries. Verdict for $9,125. The defendants made a motion for judgment notwithstanding the verdict or for a new trial, on the ground that the verdict was not justified by the evidence, that the damages were excessive, and on the further ground of newly discovered evidence. The trial court denied the motion for judgment, but found the damages excessive, and ordered a new trial unless the plaintiff would consent to a reduction of them to $7,000. The plaintiff so consented, and the defendants appealed from the order.

We are of the opinion that the question of the defendant's negligence was one of fact, and that upon the record the defendants were not entitled to judgment notwithstanding the verdict. As there must be a new trial, we refrain from discussing the evidence.

The contentions of the defendants that the damages were excessive

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and that a new trial should have been granted on account of newly discovered evidence are closely connected and will be considered together. The diminution of the plaintiff's earning capacity by reason of his injury was an important factor in the assessment of his damages, and the amount he was earning before he was disabled was a weighty element for the consideration of the jury. Thompson v. Great Northern Ry. Co., 79 Minn. 291, 82 N. W. 637. Again, where the award of damages in any case is so excessive as to indicate that they were given under the influence of passion or prejudice, and the circumstances as disclosed by the evidence are such as to show a fair probability that the jury were influenced by the same passion or prejudice in determining other issues that induced them to give excessive damages, a new trial should be granted absolutely, instead of reducing the damages. Goss v. Goss, 102 Minn. 346, 113 N. W. 690.

The plaintiff testified, relevant to his earning capacity before he was injured, to the effect that he earned for a time $10 per day as a rougher in the mill of the Republic Steel & Iron Company at Alexandria, Indiana, and that he earned $125 per month for three years as a switchman for the same company in its yards at the same place. The motion for a new trial on the ground of newly discovered evidence was based upon the affidavits of the defendant's counsel, tending to show diligence, and the affidavits of four employees of the steel company, who were in a position to know what wages the plaintiff received when working for the company, which were to the effect that his wages did not exceed $2.50 per day during the time he was in the employ of the company.

It is true that, as a general rule, a new trial will not be granted on the ground of newly discovered evidence which is simply impeaching or cumulative. There are exceptions to the rule. See Hanson v. Bailey, 96 Minn. 274, 104 N. W. 969. The newly discovered evidence in this case was not cumulative. It was impeaching; but it was also original evidence relevant to an important issue, the amount of damages the plaintiff had sustained. While such evidence could not in any way, except as impeaching evidence, affect the main issue, the plaintiff's right to recover some damages, yet it would directly affect the question of the amount of the damages. The record

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affords no warrant for assuming that the plaintiff's testimony as to his earning capacity did not affect the amount of the verdict.

Great caution should be exercised in granting new trials on the ground of newly discovered evidence, and where a motion is made for a new trial solely on such ground, and is denied by the trial court, this court will not disturb the ruling, except where there was a clear abuse of discretion by the trial court. If, in this case, the newly discovered evidence was the sole ground upon which the motion for a new trial was based, we would hesitate long before reversing the order denying it; but such is not the case. The real question is whether, in view of the excessive award of damages, as found by the trial court, and in view of the newly discovered evidence, the court ought not to have granted absolutely a new trial, instead of granting it unless the plaintiff consented to reduce the damages in the sum of $2,125. We are of the opinion that the order for a new trial should have been absolute.

Order reversed and new trial granted.

FRANK ARKO v. SHENANGO FURNACE COMPANY and Another.[1]

February 26, 1909.

Nos. 15,961—(258).

Master and Servant.

The plaintiff was injured while trying to stop a loaded ore car on a gravity track in the defendant's mine. The evidence was sufficient to sustain a finding that the defendant was negligent in not warning and instructing the plaintiff as to his duties and the dangers incident thereto, and that he was not guilty of contributory negligence. The court did not err in its instructions to the jury.

Action in the district court for St. Louis county against the Shenango Furnace Company and the Duluth, Missabe & Northern Railway Company to recover $25,712 damages for personal injuries received while plaintiff was in the employ of the defendant Furnace Company

[1] Reported in 119 N. W. 789.

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and engaged in assisting in the loading of ore cars belonging to the defendant railway company. The facts are stated in the opinion. The case was tried before Dibell, J., who directed a verdict in favor of the defendant railway company. The jury returned a verdict against the defendant furnace company for $6,000. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant furnace company appealed. Affirmed.

Washburn, Bailey & Mitchell and *E. C. Kennedy,* for appellant.

Alexander Marshall and *Theo. Hollister,* for respondent.

START, C. J.

On August 13, 1906, the plaintiff was working for the defendant in its iron mine, and was injured while trying to stop a loaded ore car which could not be controlled by the brake, on account of its defective condition, by the use of a pinch bar. He brought this action in the district court of the county of St. Louis to recover damages sustained by reason of his injuries on the ground of the alleged negligence of the defendant in failing to warn or instruct him as to his duties and the dangers incident thereto. He recovered a verdict for $6,000. The defendant appealed from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

The evidence, taking the most favorable view permissible for the plaintiff, as the jury had the right to do, tended to show the facts following:

The plaintiff is a common laborer, thirty two years old. He came to this country some nine years ago from Austria, where he was engaged in farming, but since coming here he has worked in and about iron mines. He never worked as a brakeman, and never had anything to do with railway cars or tracks. After entering the employ of the defendant, he worked twenty days around a steam shovel, and then was directed by the surface boss at the mine, Dahl, who looked after, hired, and discharged the men on the surface, to go to work at the pocket where railroad cars were loaded with ore, and that John Zemlak, the pocket man or lander, would tell him what to do. Dahl cautioned him about the danger of the cars running away, and the damage they would do to the defendant's property if they did, and that he must watch the cars, and not let them run away. The plaintiff

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went to work at the pocket as directed. The cars to be loaded were placed upon the track that ran by the ore pocket upon a grade, so that, after a car was loaded and started, it would run by gravity down to the place where the loaded train was made up. When a car got opposite a pocket, it was stopped by a block put under the front truck to hold it until it was loaded. Then the block would be removed and the car started by using a pinch bar, an iron bar four and one half feet long, one end of which would be placed between the rail and a rear wheel and the car "pinched" ahead. A loaded car weighed some sixty thousand pounds, and, once started, it would, if not controlled, rush down the grade with destructive force. The method of controlling the movements of a car, when once started, was by the use of a brake by a man standing on the car. The plaintiff was never instructed as to the proper manner of using the pinch bar, or the danger of trying to stop a moving loaded car by trying to pinch it in front. Prior to the accident, the plaintiff had seen Zemlak stop or control the movement of empty cars by putting the pinch bar between the track and the front wheel. At the time of the accident, which occurred about ten o'clock at night, a car had been loaded, the plaintiff was on the ground, holding the pinch bar, his partner, Zemlak, was on the top of the car, and called to him to look and see if the brake was all right, but, before he could examine or answer, the timekeeper, who was standing by, spoke, and said that the brake was all right. Thereupon Zemlak directed the plaintiff to pinch the car away; that is, start it. He then went behind the car, after removing the block from the front, and pinched the car to give it a start. When the car had gone downgrade a few feet, Zemlak who was on top of it managing the brake discovered that he could not control the car with it and called to the plaintiff: "Frank, stop the car quick—brake no good." The plaintiff jumped from behind to the front wheel of the rear truck, and placed the pinch bar between the flange of the wheel and the rail. When the wheel struck the end of the pinch bar, it threw him under the car, and his right leg was thereby so mangled that it was necessary to amputate it.

The reason given by the plaintiff why he did not use the block, instead of the bar, is this: "Q. When you went around to get in front of this wheel, you were just about where the block was? A. The

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block is far in front of the car. Q. How far ahead of you was the block? A. Well, so far as was the car running. Q. The car had gone ahead some? A. Well, go three or four feet, or five feet maybe, but I don't—that time the block, I know the block is front. I don't can catch— Q. Why didn't you get the block and put under that? A. I thought the pinch bar all right for that. Q. Why didn't you get the block? A. Before I get the block, the car was running away, and partner was there on the car. Maybe he be killed. Q. Didn't you know the block would stop the car better than the pinch bar? A. Well, block be all right. If nothing block car get away, and—"

The contention of the defendant, briefly stated, is that the evidence was wholly insufficient to support the verdict, because, if there was an emergency which would justify the plaintiff in using the pinch bar in the manner he did, the emergency was created by himself by not examining the brake as he was directed, instead of relying upon the statement of the timekeeper; that the defendant could not have reasonably anticipated an emergency in which the plaintiff could possibly make use of the pinch bar to stop the car, or that the plaintiff was so ignorant as not to know how to use a pinch bar; and, further, that this case is clearly one of an improper use by a servant of a proper instrumentality furnished by the employer. The evidence is clear that the plaintiff did not create the emergency by not examining the brake, for, after the timekeeper had announced that the brake was all right, Zemlak, from whom the plaintiff was to receive orders, directed him to start the car, and he promptly obeyed.

The serious question in this case is whether the defendant in the exercise of ordinary care ought to have anticipated that injury was liable to result from the use of the pinch bar by an inexperienced and uninstructed employee in starting and stopping heavy ore cars on a gravity track. If, in view of the facts which the evidence tends to prove, the defendant ought to have so anticipated, it was its duty to have warned and instructed the plaintiff as to his duties and the dangers incident thereto, although it could not have anticipated the particular injury that did happen. Christianson v. Chicago, St. P., M. & O. Ry. Co., 67 Minn. 94, 69 N. W. 640.

Upon a consideration of the whole evidence we are of the opinion that the question of the defendant's negligence and the contributory

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negligence of the plaintiff were questions of fact, and that the verdict is sustained by the evidence. Granrus v. Croxton Mining Co., 102 Minn. 325, 113 N. W. 693; Gussart v. Stone Co., 134 Wis. 418, 114 N. W. 799.

The defendant urges a number of alleged errors of the trial court in instructing the jury, and refusing requested instructions. The requests were properly refused for the reason that they were either not correct or misleading in view of the evidence. There was no reversible error in the instructions given, considered as a whole.

This action was also brought against the Duluth, Missabe & Northern Railway Company, the owner of the car, and at the close of the evidence the court instructed the jury to return a verdict for the defendant. The defendant assigns as error the giving of the instruction. It does not appear that the railway company was made a party to the motion for a new trial or to this appeal. It is entitled to be heard before a new trial can, in any event, be granted as to it. But, this aside, it does not appear from the record that the instruction was wrong.

Order affirmed.

JULIUS KESSLER & COMPANY v. S. PARELIUS and Another.[1]

February 26, 1909.

Nos. 15,966—(218).

Promissory Note—Parol Evidence.

In an action to recover on a promissory note, parol evidence was admissible to show that the parties had previously made an oral agreement for the purchase of a commodity in pursuance of which the note was given, that under such agreement the payee of the note was to make its maker a certain loan, and that the loan had not been in fact made. Wheaton Roller-Mill Co. v. Noye Mnfg. Co., 66 Minn. 156, followed and applied.

Rescission of Contract.

A substantial failure of consideration of a contract may justify its rescission.

[1] Reported in 119 N. W. 1069.

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Assignments of Error.

Various assignments of error considered, and *held* to be without substantial merit.

Action in the municipal court of Minneapolis to recover $47.72 upon a promissory note and $42.40 paid to the government for defendants' use and benefit. The answer alleged defendant Melgord in behalf of defendants applied to plaintiff corporation for a loan and plaintiff stated it would make the loan if defendants would buy of it ten barrels of whiskey stored in bond. That on a subsequent day plaintiff by its agent stated to defendant Parelius that his codefendant and partner Melgord had agreed to buy of plaintiff ten barrels of whiskey and execute notes therefor and in consideration of that plaintiff would make the loan of $500. That thereupon Parelius executed six notes each of the amount stated above. The defendants alleged that upon discovery of the fraudulent representations they rescinded the agreement and tendered back the warehouse bond for the whiskey. The case was tried before Waite, J., and a jury which returned a verdict in favor of defendants. From an order denying its motion for a new trial, plaintiff appealed. Affirmed.

John M. Rees, for appellant.

Welch, Hayne & Hubachek, for respondents.

JAGGARD, J.

This is an action on a promissory note and for moneys paid for the use and benefit of the defendants. The note was given for certificates to certain whiskey in a government bonded warehouse, which were delivered to the purchaser as a part of the transaction for which the note was given. The money advanced was for the government tax on a part of the whiskey, which was afterwards withdrawn from bond. Plaintiff rested its case upon the written contract, the note. The defendants, over plaintiff's objection, gave oral testimony as to what they claimed was the oral contract entered into at the time the note was given, to the effect that the plaintiff, through its agent, one Dowdall, had agreed, in addition to the contract to sell the whiskey, to loan the defendants $500 as a part consideration for the note, and that on the following day plaintiff refused to make the loan. The defendants claimed that for this reason they had a right to rescind, and that they

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had in fact rescinded, the contract, including the note. The jury found for the defendants. This appeal was taken from the order denying plaintiff's motion for a new trial.

1. The first group of assignments of error are addressed to the proposition that the trial court committed reversible error in receiving parol testimony concerning the agreement to loan, because it disputed or added to the terms of the written contract. There is no merit in these assignments.

In Wheaton Rolling-Mill Co. v. John T. Noye Mnfg. Co., 66 Minn. 156, 68 N. W. 854, it was held, per Mitchell, J., that "where, in the absence of fraud, accident, or mistake, the parties have deliberately put their contract into writing, which is complete in itself and couched in such language as imports a complete legal obligation, parol evidence is inadmissible to introduce into the contract a term which is not contained in the writing. The only criterion of its completeness or incompleteness is the writing itself. It cannot be proved to be incomplete by going outside of the writing, and proving that there was an oral stipulation entered into not contained in the written agreement. But, while the writing itself is the only criterion, it is not necessary that its incompleteness should appear on its face from mere inspection. It is to be construed, as in any other case, in the light of its subject-matter, and the circumstances in which, and the purposes for which, it was executed, which evidence is always admissible in the construction of written contracts, in order to put the court in the position of the parties." And see Potter v. Easton, 82 Minn. 247, 84 N. W. 1011; Southwick v. Herring, 82 Minn. 302, 84 N. W. 1013.

In the case at bar no writing purporting on its face to contain the whole agreement appears in the record. The parol testimony admitted did not tend to contradict, dispute, or add to, or in any way affect, any term of the writing. It tended to show the situation of the parties when the note was executed, and the separate agreements then made, and that the agreement was a substantial part of the consideration of the note. Parol evidence is always admissible to show the actual consideration of a contract.

2. Plaintiff also urges that, in absence of fraud or mistake, partial failure of consideration is not sufficient ground for rescission, and refers us to 24 Am. & Eng. Enc. (2d Ed.) 644, 645. The citation

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does not support plaintiff's proposition, but expressly sets forth that a total or substantial failure of consideration justifies rescission. That the jury was justified in finding that there was a substantial failure of consideration here is obvious.

3. Plaintiff appeals to the familiar rule that one who seeks to bind another by the acts of an agent must affirmatively prove the agent's authority, and that the agent's own statement on the subject is not sufficient. Here, however, there was sufficient evidence, apart from the agent's own statement, to sustain the verdict.

4. Further, plaintiff contends that, no damages or prejudice being shown, defendants were not entitled to rescind the contract. This point is without merit. The agreement to make the loan might properly have been found to have been a substantive part of the contract which the jury determined to have been made. If the jury so found, and also found for the defendant on other points, defendant was entitled to recover. Loveland v. Steenerson, 99 Minn. 14, 108 N. W. 831.

5. Finally, plaintiff urges error in the admission of evidence of a conversation prior to the date of the alleged oral agreement. No reversible error appears. It has been held that parol evidence was admissible to show what the real agreement was. It was, therefore, competent corroboration to show the negotiation immediately preceding it.

These are all the questions raised in plaintiff's original brief. At one place it is true there is a contention that the title to the whiskey passed to defendants by delivery of the certificates and acceptance of the notes. Defendants' brief, which must have been prepared without having read plaintiff's brief, argues that the rescission was complete. Plaintiff filed a reply brief, in which he urged that the contract was executed fully and completely, and could not be rescinded except for fraud, which was not in issue in the case, because title had passed to the defendants. Such a record does not properly present the question for our consideration. The issue of rescission was, however, fully submitted to the jury by the trial court, under instructions to which no exceptions were taken, and which are in themselves proper and conclusive on the subject. Corse v. Minnesota Grain Co., 94 Minn. 331, 102 N. W. 728. No error in this connection appears.

Affirmed.

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A. C. MIDDELSTADT v. GRAND LODGE OF ORDER OF SONS OF HERMANN.[1]

February 26, 1909.

Nos. 15,972—(259).

Benefit Certificate—Designation of Beneficiary.

Where the constitution of a benevolent association names the persons from whom a member may select a beneficiary to receive an insurance fund, and provides that any beneficial certificate issued to any other person shall be null and void, but reserves the right to the member to change the beneficiary already named and dispose of the proceeds of the certificate by a will, a designation of any person not within any of the classes named, other than by will, is null and void.

Same—Designation in Will.

Where the member of a beneficial association disposes of the proceeds of a beneficial certificate by will, it is not necessary that the party thus receiving the fund shall have had an insurable interest in the life of the insured.

Same.

When a member of a beneficial association, with the consent of the association, has inserted in the certificate the name of a person whom he was not authorized by the constitution to name as beneficiary, and thereafter by will bequeaths the proceeds of the certificate to the person thus illegally designated, the fact that such person was illegally named as beneficiary is of no consequence, as the fund passes by testamentary disposition, and not by virtue of the designation.

Action in the district court for Hennepin county by the executor of the estate of Johann Link, deceased, to recover $1,000 upon a benefit certificate. The answer admitted that the amount was due from defendant, and alleged that besides the plaintiff Charles A. Link, Mary Beach, Frederick Manahan, Merritt Milo Daily, Amelia W. Daily and Addis Merritt Daily made claim to the fund, asked that these persons be made parties to the action and defendant be discharged from liability upon payment of the amount into court. Upon such payment it was discharged. Thereupon Charles A. Link and Mary Beach filed their complaint in intervention alleging that the benefit certificate

[1]Reported in 120 N. W. 37.

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could only be paid or disposed of by will to the persons named in the constitution and by-laws of defendant order. The three Dailys in their complaint in intervention alleged that for a valuable consideration the decedent designated them as three of his beneficiaries. The case was tried before Brooks, J., who made findings of fact and as conclusions of law found that Charles A. Link and Mary Beach were entitled to judgment awarding them ten dollars each and that the three Dailys were entitled to judgment awarding them $970, the residue of the sum deposited in bank. From the judgment entered thereon Charles A. Link and Mary Beach appealed. Affirmed.

The contract between Link and Merritt Milo Daily, Amelia W. Daily and Addis Merritt Daily was as follows:

"It is hereby agreed by and between the party of the first part [Link] and the parties of the second part [the Dailys] that the party of the first part has the date last aforesaid assigned and transferred and also by his last will and testament to the parties of the second part nine hundred and seventy ($970) dollars, out of his life insurance policy now held by him in the Order of the Sons of Hermann of the state of Minnesota, and in consideration therefor the said parties of the second part hereby agree to pay all the dues, assessments and special assessments that may be made, levied and assessed by the Order of the Sons of Hermann in the state of Minnesota, according to their by-laws and constitution, upon said insurance policy and against said party of the first part during his natural life as to his dues, assessments and special assessments, that all said dues, assessments and special assessments are to be promptly paid when they become due by the parties of the second part, otherwise this agreement shall be null and void, and the money paid by said parties of the second part shall be forfeited and the insurance policy assigned, and the will made by the party of the first part to the parties of the second part shall stand as canceled and revoked to the same force and effect as [if] the party of the first part had never made the assignment of said insurance policy or said will."

Richard & Coe, for appellants.

A. C. Middelstadt and *S. M. Finch,* for respondent Middelstadt.

Otto Kueffner, for respondent Grand Lodge.

Henry Marks, for respondents Daily.

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ELLIOTT, J.

Upon this record we can determine only whether the conclusions of law are justified by the findings of fact. From such findings it appears that on December 14, 1891, Johann Link became a member of the Order of the Sons of Hermann, and thereby was entitled to the benefits of the life insurance feature of the organization. The usual benefit certificate was issued to him, but no beneficiary was named therein. Link remained a member of the order in good standing and paid all dues and assessments for about seven years, when, being unable to pay further dues and assessments, he entered into a contract with three parties by the name of Daily, by which they agreed to pay him the amount which he had paid as dues and assessments from the time he joined the order until that time, and to make all future payments necessary to keep the insurance in force. Link, on his part, agreed to have the Dailys named as beneficiaries in the certificate to the extent of $970; the balance of $30 to be made payable to his relatives Charles A. Link, Mary L. Beach, and Frederick Manahan, who are the appellants herein. Link also agreed to make a will bequeathing $970 of the proceeds of the certificate to the Dailys. This contract was duly executed, and all the parties thereto faithfully carried out its terms. Link had the names of the Dailys inserted in the certificate, and the proper record thereof made in the records of the order, and executed his will bequeathing the $970 to the Dailys. The Dailys paid him about $200 to reimburse him for what he had previously paid to the order, and thereafter paid all dues and assessments which were necessary to keep the insurance in force until the death of Link, by which time they had invested about $400.

Upon the death of Johann Link, his will was duly probated, and A. C. Middelstadt was appointed executor. Soon thereafter the executor brought this action to recover the $1,000 due on the benefit certificate. The money being claimed by both groups of beneficiaries named in the certificate, the defendant asked that they be required to intervene in order that the court might determine to whom the money belonged. The defendant then paid the money into court and was discharged from further liability. The Dailys claimed $970 of the money by virtue of the will and certificate. Charles A. Link, Beach, and Manahan claimed the entire fund on the theory that, as the Dailys

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had no insurable interest in the life of Johann Link, and were not within the class of persons who, under the constitution and laws of the order, might be named as beneficiaries, the entire fund went to them. The executor, asserting for similar reasons that the Dailys were not entitled to the money, claimed that it became a part of the estate of Johann Link, and should be paid to his personal representative for administration through the probate court.

The trial court held that the executor was not entitled to the money; that Link and Beach were entitled only to the $10 given each of them by the terms of the certificate; that the Dailys were entitled to $970 by virtue of the fact that they had been properly named by Johann Link as beneficiaries in the certificate; that the will neither enlarged nor diminished the rights of the Dailys; and that the interveners, Link, Beach and Manahan, could not raise the question of the Dailys' insurable interest in the life of Johann Link. The executor did not appeal. Link and Beach appealed, and their rights only can be considered.

The trial court properly held that the appellants were not entitled to receive the $970, but we rest our conclusions on somewhat different grounds. As the law now stands, the payment of death benefits in any beneficial association can be made only to the families, heirs, blood relations, adopted children, fiancée, or persons dependent upon the member. Section 1703, R. L. 1905. But the rights of these parties must be determined by the law which was in force at the time of the transaction in question. When this certificate was issued, and when the Dailys were named as beneficiaries, there were no such statutory restrictions, and the choice of beneficiaries was left to be determined by the parties, subject to the provisions of the articles of incorporation and the constitution and by-laws of the association. Walter v. Hensel, 42 Minn. 204, 44 N. W. 57; Gruber v. Grand Lodge A. O. U. W., 79 Minn. 59, 81 N. W. 743.

This association was organized under title 3, c. 34, G. S. 1878. The articles of incorporation, as found by the trial court, state that one of the objects of the corporation is to "provide for the creation of a fund out of which to pay a certain amount to the widow, descendants, heirs, or parties properly designated, as the case may be, of the deceased member, * * * all according to the constitution, rules, regulations, and by-laws of this order." The corporation was thus

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authorized to provide that persons other than those named in the articles might be designated as beneficiaries. Paragraph 7 of article 23 of the constitution provides that the benefit certificate may be executed in favor of the wife, children, father, mother, or grandparents, brothers, sisters, and their children, foster parents or foster children, brothers and sisters of father or mother, or the lodge to which the member belonged, and that any beneficial certificate issued to any other person should be null and void. But the next paragraph in the same section provides, in the somewhat crude language of the translation which was offered in evidence, that: "Notwithstanding the above determinations, has every member the right to abolish the same and by a last declaration of his will and testament dispose of the money and say to whom it is to be paid out. In such a case the restrictions named in paragraph 7 are of no effect." For the protection of the order it then provided that, when the money is thus disposed of by will, the certificate must be marked as transferred and the secretary of the lodge informed of the fact.

The effect of this provision was to authorize the member to deprive a beneficiary who had been named in the certificate of his right to the money and dispose of the fund in any manner he desired by his last will and testament. A member had the power to change the beneficiary at any time prior to his death, but his right of selection of a new beneficiary was limited to the classes designated in the constitution of the order, which expressly provided that the designation of other persons would be null and void. The constitution gave him the right to annul the previous designation of a beneficiary, thus making the money payable to his estate, and subject to disposition by his last will. This right was exercised by Johann Link, and the Dailys were entitled to the money by virtue of the testamentary disposition, and not as beneficiaries named in the certificate. Not being within either of the classes from which the member was required to select a beneficiary, their designation as beneficiaries was, in the language of the constitution, null and void. They could neither be made beneficiaries directly, nor indirectly by the assignment of the certificate. The contract should be construed as imposing the obligations therein created, so far as legal, upon the parties thereto, and as it was fully performed it served its purpose.

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As the Dailys acquired their right to the money under the will, the question of their insurable interest in the life of Johann Link is of no importance. The will had no binding effect during the life of Johann Link, and the public policy, which forbids a mere stranger having no insurable interest to take out or otherwise acquire insurance on the life of another, does not prevent one holding life insurance from disposing of the benefit by will. This is no more a wager than is the testamentary disposition of any other species of property. Stoelker v. Thornton, 88 Ala. 241, 6 South. 680, 6 L. R. A. 140; Rison v. Wilkerson, 3 Sneed (Tenn.) 565; Weil v. Trafford, 3 Tenn. Ch. 108; Williams v. Corson, 2 Tenn. Ch. 269; Tennessee v. Ladd, 5 Lea (Tenn.) 716; Highland v. Highland, 109 Ill. 366, 13 Ill. App. 510; Catholic v. Priest, 46 Mich. 429, 9 N. W. 481; Clark v. Durand, 12 Wis. 248; Gambs v. Covenant, 50 Mo. 44; Swift v. Railway, 96 Ill. 309; Bickerton v. Jacques, 28 Hun (N. Y.) 119; Union Mut. Life Ins. Co. v. Stevens (D. C.) 19 Fed. 671.

The trial court properly held that the appellants were not entitled to the fund in question, and, as that is the only question before us, the judgment is affirmed.

H. D. IRWIN v. GOULD ELEVATOR COMPANY.[1]

February 26, 1909.

Nos. 15,983—(245).

Construction of Contract.

A certain contract considered, and *held* to limit the commission of appellant to six per cent. of the stipulated amount.

Action in the municipal court for Minneapolis by the assignee of the claim to recover $441.43, balance due for services in furnishing plans and specifications, in superintending the construction of an elevator, and for materials furnished in its construction. The case was tried before Charles L. Smith, J., who found in favor of plaintiff for

[1] Reported in 119 N. W. 1065.

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the sum of $57.01, against which he allowed a set-off of $60 and granted defendant its costs and disbursements. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

S. Meyers, for appellant.

C. W. Somerby, for respondent.

LEWIS, J.

Respondent company, being desirous of constructing a grain elevator in the vicinity of Minneapolis, entered into negotiations with S. H. Tromanhauser, an engineer and contractor of fifteen years' experience in the building of elevators. The negotiations continued from January until August 4, 1906, at which time a contract was signed. Prior to the execution of the contract, Tromanhauser made a proposition in writing to construct an elevator, on the proposed site, of eighty thousand bushels capacity, for the sum of $40,000, furnishing all of the material, and he also made a separate proposition to superintend the work upon a commission of seven per cent., the company to furnish all of the material. Their negotiations terminated in a contract of date August 4, 1906, which in part reads:

"Witnesseth: That the party of the first part [Tromanhauser] hereby promises and agrees to furnish all plans, details, drawings and specifications for the erection of a brick fireproof grain elevator with a capacity of 80,000 bushels, according to the plans agreed upon for the party of the second part, and to carefully and faithfully superintend and oversee the erection and construction of said elevator and to use his best efforts to secure the completion thereof as soon as possible, said plans, details, drawings and specifications to be prepared and completed with all reasonable speed. And the said party of the second part in consideration of the agreements of the first party hereby promises and agrees to pay the party of the first part for the services to be performed by him the sum of seven per cent. on a net sum of $38,000.00, and to pay the sum in three instalments. * * *"

The elevator company agreed to furnish all material, machinery, etc., and to pay for all the labor and expenses, including the wages of one foreman; and the closing part of the contract reads:

"And the party of the first part shall not be held responsible for any delays howsoever caused, but he shall use all reasonable efforts to

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have said elevator ready to receive grain on or about the 15th day of November, 1906.

"And said second party further agrees to furnish and provide the necessary materials, machinery and labor for said elevator as fast as may be required by the first party.

"It is further agreed that if the party of the first part shall fail on his part to have said elevator ready to receive grain on the above mentioned date, then he shall receive only six per cent. of the above agreed amount. But he shall in no way be held for delays caused by manufacturers or others furnishing the necessary material or labor."

The building was not completed until May, 1907. Six per cent. of the commission was paid, and this action was brought for the purpose of recovering the one per cent., and for the purpose of recovering the value of certain materials and labor furnished by appellant. The company answered, and alleged that appellant had not diligently and faithfully performed the terms of his contract, that the delay in construction was caused by him, and pleaded as an offset that respondent had paid for the benefit of appellant the sum of $108 for the services of a foreman.

The trial court found that the delay in construction was not caused by the manufacturers or others in furnishing necessary material or labor, and was not by reason of any act or omission on the part of appellant in performing the duties required of him by the terms of the contract; that the cause of the delay arose from the fact that, upon excavating the foundation, it was found that the ground contained a bed of quicksand, which required a change in the plans substituting piling and concrete work for the method originally contemplated, which necessitated extra time. The court allowed the offset to the extent of $60, and ordered judgment for respondent.

We have examined the several assignments of error, and are of opinion that with reference to the sufficiency of the evidence and the rulings on the admission of evidence no error was committed, and it is not necessary to refer to them here in detail. The principal question in the case involves the construction of the contract, and to that attention will be given.

The trial court was correct in limiting appellant's commission to six per cent. Although the contract is somewhat indefinite, when

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carefully examined, it fairly appears that it was the intention of the parties that appellant should not receive more than six per cent. commission if for any reason the building should not be completed sufficiently to receive grain by November 15, 1906. Appellant suggests that the contract should be construed to mean that he was entitled to recover the seven per cent. commission, no matter what the cause of the delay, provided he used reasonable diligence in endeavoring to have the building completed on time, and that his commission could not be reduced to six per cent. unless he should in some way be at fault. This construction is unreasonable, for it would imply that it was the intention of the parties to penalize appellant to the extent of one per cent. in case he should fail to perform his duty, and to limit the penalty to that amount, no matter to what extent he might be negligent.

We are aided, somewhat, in construing the writing by taking into consideration the standpoint of the parties and the facts which were evidently in their contemplation at the time of its execution. Appellant was an experienced engineer and contractor, as well as an architect. He had many years' experience in constructing this class of buildings. Respondent company was necessarily somewhat dependent upon his skill and judgment, and whether they should employ him to furnish all the materials and construct the building, or upon a commission basis, it is evident that a very important feature in the negotiations was to secure the completion of the building to do business from November 15, 1906, and naturally respondent would be willing to pay a premium if the building were completed on time. According to the evidence, appellant had to some extent investigated the site where the proposed building was to be erected, and had satisfied himself as to the nature of the foundation, and had submitted his proposition to construct the building upon the result of such investigation.

The contract contains the apparent contradictory statement that appellant should not be held responsible for any delays, howsoever caused, but should use all reasonable efforts to have the building ready to receive grain on or about November 15. It is evident that this language signifies no intention to relieve appellant from the responsibility of using all reasonable effort to complete the elevator on time, and simply means that appellant should not be held responsible for

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any delays caused by other things than as a result of his own negligence. But this has no reference to the amount of his commission. The statement that appellant should in no way be held for delays caused by the manufacturers or others in furnishing necessary material or labor was not intended to excuse him from all responsibility growing out of his own negligence. The provision which restricts the commission to six per cent. in case "the first party shall fail on his part to have said elevator ready to receive grain," etc., was not intended to depend alone upon appellant's lack of diligence. The idea was that, even though all the parties proceeded with reasonable diligence and in good faith, yet, if for any reason there should be delay in completing the building on time, then appellant was not to be paid the extra one per cent. commission.

This construction is justified, not only by the language of the contract, but from a consideration of the circumstances in which the parties were placed at the time of its execution.

Affirmed.

WILLIAM L. WEST and Others v. VILLAGE OF WHITE BEAR and Others.[1]

February 26, 1909.

Nos. 16,009—(154).

Injunction—Cutting Trees on Platted Street.

Respondents were the owners of certain lots in the village of White Bear, which, according to the plat, abutted on Lake avenue, which had never been improved or opened as a public street. Across the front of respondents' lots, and overlapping Lake avenue to some extent, ran a road about twenty two feet wide, which had become a public highway by user. Acting upon the belief that they possessed authority to widen the road to a distance of two rods on either side of the center line thereof, the village officers proceeded to cut down the trees standing between the easterly line of the traveled road and the center of Lake avenue as platted. *Held*, the trial court was justified in finding that the destruction of the trees was not warranted, for the reason that the widen-

[1] **Reported in 119 N. W. 1064.**

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ing of the road at that point would meet no useful purpose, inasmuch as no authority existed for making the improvement continuous along the line of the road.

Action in the district court for Ramsey county by five owners of real property in White Bear Village to enjoin defendants, members of the Village Council of White Bear, from cutting, destroying, removing or in any manner interfering with certain oak trees upon plaintiffs' land. The allegations of the answer were substantially the same as in the case of Gilbert v. Village of White Bear, infra, page 239. The case was tried before Hallam, J., who ordered that defendants be enjoined from cutting, destroying, removing or in any manner injuring or interfering with the trees upon plaintiffs' lots or upon Lake avenue; but that defendants be not enjoined or prohibited from hereafter widening and improving the roadway upon the platted portion of Lake avenue in front of any of the lots so as to conform the same to the width of the roadway as it shall from time to time be continuously improved either to the north or south of those lots. From an order refusing defendants' motion to amend the findings of fact and denying defendants' motion for a new trial, they appealed. Affirmed.

C. D. & R. D. O'Brien, for appellants.

Harris Richardson and *Harold C. Kerr*, for respondents.

LEWIS, J.

This action was commenced by five property owners, whose premises abutted on Lake avenue in the village of White Bear, to restrain the village authorities from cutting certain trees upon their premises. In so far as respondents West and Mabon are concerned, the case is controlled by the decision in Gilbert v. Village of White Bear, infra, page 239, 119 N. W. 1063. The other respondents, however, occupy a slightly different position. In front of their premises some of the trees sought to be removed by the village authorities are located within the limits of Lake avenue.

The trial court ordered judgment restraining the authorities from removing these trees upon the theory that, although they were within the limits of the platted highway, it was not the purpose to improve Lake avenue as a whole, but it was the intention to widen the old traveled road; that, not having taken the proper steps to widen that road

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by condemnation proceedings, and having no authority so to do at any other point than in front of these respondents' premises, where it intersected or overlapped Lake avenue to some extent, it would answer no useful purpose, and would result in unnecessary injury to remove the trees at that point.

From a reading of the record it is apparent that the authorities were acting under a belief that they had authority to widen the traveled road to the full extent of four rods along the entire distance; and, it having been shown before the trial court that the plan could not be pursued for want of authority, there would be no object in cutting out that part of Lake avenue in front of respondents' premises. The conclusion of the trial court was correct. It does not follow that, merely because the trees are within the limits of Lake avenue as platted, the authorities have a right to remove them. The rule is elementary that an abutting landowner owns to the middle of the platted street, and that the soil and its appurtenances, within the limits of the street, belong to the owner in fee, subject only to the right of the public to use or remove the same for the purpose of improvement.

Affirmed.

PHILIP GILBERT v. VILLAGE OF WHITE BEAR and Others.[1]

February 26, 1909.

Nos. 16,010—(153).

Dedication of Road by User—Subsequent Statute.

Chapter 152, p. 155, Laws 1899, providing that, when a road has been used, kept in repair, and worked for six years continuously as a public highway, the same shall be deemed to have been dedicated to the public to the width of two rods on each side of the center line of the road, has no application to roads which had become established highways by user prior to the time the act took effect.

Action in the district court for Ramsey county to restrain the village of White Bear and the members of the village council from the intended cutting, destroying, and removal of certain oak trees upon

[1] Reported in 119 N. W. 1063.

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plaintiff's premises. The answer of defendants alleged that Lake avenue, as platted, was sixty feet in width and ever since its dedication in the year 1871 had been used, improved and publicly traveled as a public highway; that with the growth of population it became necessary to improve the same and open the street to the full width of sixty feet, and that defendants as officers of defendant village were charged with this duty. It also alleged that before the platting Lake avenue was a county road duly laid out as a county road four rods wide and had been traveled and occupied for more than fifty years. The reply admitted the platting, but alleged that the trees marked by defendants for cutting were not within the limits of Lake avenue but on plaintiff's premises. The case was tried before Hallam, J., who found as conclusion of law that plaintiff was the owner of the strip of land between the roadway and Lake avenue and of the trees standing thereon, and granted the injunction prayed for. Plaintiff's motion to amend the findings of fact was denied. From an order refusing defendants' motion to amend the findings of fact or to grant a new trial, they appealed. Affirmed.

C. D. & R. D. O'Brien, for appellants.

Harris Richardson and *Harold C. Kerr,* for respondent.

LEWIS, J.

Respondent commenced this action to enjoin the officers of the village of White Bear from cutting, destroying, and removing certain trees upon his property. The trial court found that respondent was the owner of certain lots, according to certain plats, fronting on White Bear Lake for a distance of ninety five feet, and valued at $5,000. According to the original plat, of date June 29, 1871, a street was designated and known as Lake avenue, and all of the lots constituting respondent's premises abut upon this street; but it was never improved or used as a street or highway. The trial court found the facts as follows:

That a roadway across the lots had been continuously traveled by the public for the period of more than fifty years; that the traveled track thereof, together with the space necessarily incident thereto, covered a width in front of the premises from eighteen and one half to twenty two feet; that the land contiguous to the road was covered

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with trees, but no part of such land had ever been used, occupied, or traveled as a part of the road, nor had any part of it ever been necessary, or used, for the repair or improvement of the same. This roadway is entirely upon respondent's lots, is nearly parallel with Lake avenue, as platted, and the space between the westerly line of Lake avenue and the easterly line of the roadway is twelve feet, more or less. No part of the intervening space of twelve feet is within the public highway, or within the limits of Lake avenue as platted, and the trees involved in this controversy are located in this intervening space.

The village authorities assumed the right to cut down the trees occupying the intervening space between the traveled road and Lake avenue, upon the theory that they stood within the limits of the public highway and that it became necessary to cut them in pursuance of a plan to widen the road. No doubt the officers proceeded in good faith, but according to the facts as settled by the findings the trees stood upon land owned by respondent, and not within the limits of any road or highway, nor within the limits of Lake avenue. Appellants concede that the trees were not within the limits of Lake avenue, but claim authority to cut them by virtue of chapter 152, p. 155, Laws 1899, which was approved April 11 of that year. That act provides in part, as follows:

"When any road or portion thereof shall have been used and kept in repair, and worked for six years continuously as a public highway, the same shall be deemed as having been dedicated to the public to the width of two rods on each side of the center line of said road and be and remain until lawfully vacated, a public highway, whether the same has ever been laid out as a public highway or not." Respondent acquired title to the premises in 1897, and, if the act above referred to has any application, the six years expired April 11, 1905. Whether that act is applicable is the only question in this case.

Whatever may be the effect of this statute upon roads having their inception by user after the act went into effect, concerning which we express no opinion, it is evident that it does not apply to a road which had become an established highway at the time the act took effect. The trial court found that long prior to 1899 a road not exceeding twenty two feet in width had been established by usage. The limits of this road are therefore as well defined as a road which is laid out

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upon petition by the public authorities, or which has been dedicated to the public by the execution and filing of a plat, and it was beyond the power of the legislature to appropriate private property for that purpose without making provision for just compensation.

Affirmed.

THEODORE DOLGE v. NORTHERN PACIFIC RAILWAY COMPANY.[1]

February 26, 1909.

Nos. 16,041—(269).

Railway—Split Switch.

The proper throw necessary for a split switch, in railway construction, is an engineering proposition, to be determined by properly qualified engineers, and the verdict of a jury, or the opinion of judges, cannot be substituted therefor.

Same—Negligence.

It having been shown that a throw of five inches was the standard adopted and recommended by the American Railway, Engineering, and Maintenance of Way Association, and that for all railroad purposes a throw of from four to five inches was safer than a less distance, *held*, respondent was not guilty of negligence in maintaining a split switch with a throw of four and three fourths inches, although a switchman's foot might be more readily caught therein than if the distance had been less.

Action in the district court for Hennepin county by the administrator of the estate of Charles A. Dolge, deceased, against defendant railway company and John Schmidt, one of its section foremen, to recover $5,000 for the death of the intestate. The complaint alleged that defendant negligently furnished the intestate with a road bed containing a split switch, the point of which was so far removed from the main rail that it constituted a trap for the feet of its employees, including the intestate, and permitted his feet to catch therein and did hold them and by reason thereof he was run down and killed. The answer of the defendant company contained a general denial and allegation that the injury was caused solely by the negligence of intestate

[1] Reported in 119 N. W. 1066.

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and the risks incident to the employment. The case was tried before Frederick V. Brown, J., who directed a verdict in favor of defendant Schmidt. The jury returned a verdict against defendant company for $3,500. From an order granting defendant company's motion for judgment notwithstanding the verdict, plaintiff appealed. Affirmed.

Larrabee & Davies, for appellant.

Charles W. Bunn and *Emerson Hadley,* for respondent.

LEWIS, J.

Appellant's son was a switchman in the employ of respondent railway company at its yards in the city of Minneapolis, and was killed on the track while engaged in the performance of his duties. Negligence is based upon the ground that respondent maintained a defective split switch, in that the movable point of the switch, when open, was at a greater distance than necessary, which condition permitted the foot of the switchman to become caught and held. Appellant recovered a verdict, and the trial court ordered judgment for respondent notwithstanding the verdict.

It was shown at the trial that the distance between the point of the switch, when open, and the main rail was four and three fourths inches, and appellant attempted to prove that three and one half inches was the extreme limit necessary. It being shown that the width of a switchman's shoe exceeds three and one half inches, it was claimed that the deceased could not have had his foot caught in the space, had the switch in question been maintained at a distance of three and one half inches. It was proven by respondent, and the fact was not controverted, that several years ago the American Railway, Engineering, and Maintenance of Way Association adopted five inches as the standard throw of split switches, and that it has been the purpose of respondent and other railway companies to conform to this standard from time to time as new switches have been installed. The evidence established beyond controversy the fact that no uniform standard had been installed at the time of the accident, and that the intervening space between the point of the switch and the main rail varied from three and one half to five inches.

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It was also shown that the space of three and one half inches at least was necessary, even when the rails and the switch, the car wheel and axles, and the entire equipment is new and in perfect condition. The flange of the ordinary car wheel is one and one half inches thick. Conceding that the flanges may be worn for the space of an inch before the wheel is discarded, an additional space of one inch would be required to allow for the play of wheels in that condition. So three and one half inches at least would be required, assuming that the axles and the switch bearings were in perfect condition. By competent railroad authority it is deemed wise to increase the space as far as possible, in order to guard against the possibility of striking the point of the switch when loose or worn wheels and equipment pass over it. Ample space is the more necessary from the fact that in railroad operations each company is obliged to receive and transfer cars from all parts of the country.

The fact that at the time of the accident some switches with a three and one half inch throw were in use by respondent company, and that a majority of the switches examined by appellant's witnesses were less than the five-inch standard, does not of itself establish negligence in maintaining the particular switch under consideration at four and three fourths inches. The question is not to be determined from the standpoint alone of the greatest safety to switchmen, or others, who have occasion to walk on the tracks. In constructing and operating railroads, every question which enters into the problem must be considered, and if those competent to judge of such matters have decided that safe railroading requires the maintenance of a space from four to five inches, no negligence can be predicated upon the adoption of such a standard. It cannot be assumed that the association mentioned inconsiderately adopted the five-inch standard. On the contrary, it must be assumed that such action was based upon thorough investigation as a result of experience and must be accepted, so far as the courts are concerned. Suppose respondent had adopted three and one half inches as its standard, and an accident should occur upon such a switch on account of a badly worn wheel or imperfect equipment; would not negligence be charged for maintaining a switch with too narrow a space?

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It is the general rule that the method of constructing a railroad is an engineering question. Tuttle v. Detroit, G. H. & M. Ry., 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; Illick v. Flint, 67 Mich. 632, 35 N. W. 708; Boyd v. Harris, 176 Pa. St. 484, 35 Atl. 222; Mobile v. Healy, 100 Ill. App. 586. These cases are referred to and distinguished in Clay v. Chicago, M. & St. P. Ry. Co., 104 Minn. 1, 115 N. W. 949. See also Chicago, M. & St. P. Ry. Co. v. Riley, 145 Fed. 137, 76 C. C. A. 107; St. Louis v. Burns, 97 Ill. App. 175. This is the controlling question in the case, and the conceded facts bring it within the rule.

Affirmed.

ANNIE HAWKINS v. GREAT NORTHERN RAILWAY COMPANY.[1]

March 5, 1909.

Nos. 15,880—(206).

Negligence—Question for Jury.

Plaintiff's intestate was killed while passing between cars on defendant's repair track by a collision between a car standing on that track and another pushed down by the switching train. It was the authorized custom for repair men to pass between the cars, and for defendant, when switching, to send a servant or servants ahead on the track to warn other employees on both sides of the track of the approach of the switch train. It is *held*, in view of the presumption that deceased, when attempting to cross the rails, was in the exercise of ordinary care and was not guilty of contributory negligence, that whether defendant was negligent in failing to give the customary signals, and whether plaintiff's negligence contributed to his injury, were for the jury.

Charge to Jury—Misconduct of Counsel.

There was no reversible error in the charge to the jury by the trial court, or in its refusal to grant a new trial because of misconduct of counsel.

Action in the district court for Ramsey county by the administratrix of the estate of Michael Hawkins, deceased, to recover $5,000 for

[1] Reported in 119 N. W. 1070.

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his wrongful death. The case was tried before Hallam, J., and a jury which rendered a verdict in favor of plaintiff for the amount demanded. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

M. L. Countryman, for appellant.

James R. Hickey, for respondent.

JAGGARD, J.

Plaintiff's and respondent's deceased, a car repairer, was employed on defendant's and appellant's repair track. There were five of these tracks, numbering 1 on the north to 5 on the south, which lay parallel to each other and extending from east to west. Between the two most southerly tracks, 4 and 5, was a narrow tramway for the operation of a truck. The space between its rails was filled with planking. The cars needing repairs were brought from the lead track at the western extremity of the yard by a switch engine, and were deposited on the various repair tracks. When so placed, they were put in repair by crews. To do this work the cars were placed far enough apart—about three or four feet—to enable men to work around them and pass between them. If the men wanted any bolts, they would go between the cars to the bolt house north of the tracks. If they wanted any lumber, they would go across the tracks between the cars to the south of the tracks. Under the rules of the company, the cars which were being repaired could not be moved by the train crew or other cars switched against them. When the cars on a given track had all been repaired, a switch engine and crew were brought in on the lead from the west. The cars on that track were coupled up and returned to service out of the yard. This work of coupling up the repaired cars and pulling them out took place at any time of the day, but was preferably done during the noon hour, when the car repairers were away at lunch. On the day of the accident all the cars on repair track No. 4 were ready to be put back into service. The deceased had been working during the forenoon of the day of the accident on track 2, which was the second track from the north.

There was testimony that deceased ate his luncheon, as was customary, in the mill at the southwest corner of the repair yards, because of the shelter and warmth it afforded. This was about twelve o'clock.

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Thirty minutes was the usual time allowed for luncheon. Deceased was killed about 12:30. The record does not determine positively whether, after eating luncheon, he went west on the plankway between tracks 4 and 5, and then north. It was the custom for the men to go between the cars after luncheon. "That was the usual way." Nor does the record determine positively that he had gone northerly to his work and had occasion to go south for materials. Other men, having finished their luncheon about the time of the accident, were returning to their respective places of work and were walking between tracks 4 and 5. The foreman, seeing the approach of these men, suspended switching operations for about five minutes, until all the men had passed by the point where the next coupling was to be made. Neither he nor the car repairer who was near him saw or heard anything of the deceased. Switching operations were resumed. The deceased was caught and killed between the drawbars of about the fourth car east of the one to which the foreman was engaged in making a coupling. The running out of the slack moved the cars farther east, so as to cause the collision.

1. The negligence of the defendant involved was the alleged failure on the part of the men engaged in switching on track 4 to give the usual and customary signal of warning. It was the duty of the inspector foreman to go ahead of the cars as they were being coupled and to give sufficient warning to the men that the cars were about to be moved; and it was his custom at all times to go far enough ahead of the cars to warn the men from both sides. The men were working on both sides and crossing through there all the time. "They have got to be warned. * * * I [witness, Foreman Tanner] always did, as a rule, keep ahead of my men two or three cars. Sometimes I would make the coupling all myself; other times one of the men would make them, and one would stay at the engine, and I would be still ahead of them walking down the track, opening knuckles, and hollering to everybody I see 'Look out.' We would proceed that way and couple up until we got to the end. * * * They [the car repairers] travel through there from one side to the other in carrying supplies from one track to another, and, while there are no men working on the track that you are coupling onto, they are dodging from one side to the other, going through there, and the foreman would walk

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ahead down to warn everybody and give you a show to couple up with safety. * * * I would be proceeding towards the uncoupled cars."

It was practically admitted that, at and prior to the time of the accident, nobody was on the north side of the train to give any warning of any kind. If the plaintiff's deceased came from the north, defendant's negligence is clearly made out. Defendant's contention is that all the evidence indicates deceased was passing from the north to the south when he was caught. As we read the record, however, it was more probable that he was passing from the south to the north. That neither the foreman nor the inspector foreman saw deceased does not prove that he was passing from the north to the south; for the jury might have inferred that they were not properly on the lookout and that thus no warning may have been given. Defendant has not expressly controverted this. In this view there was enough for the jury to pass upon the question whether defendant negligently failed to give the usual warning.

If, however, it is assumed that plaintiff was coming from the south, the question was also for the jury. It does not appear that the trial court was confused in failing to distinguish between what warning might or could have been given to the car repairers and what was usually and customarily given. Whether the foreman was four cars and the inspector foreman three cars west of the place of the accident, both on the south side, and whether this location made possible the usual warning by defendant's servant, who was "ahead while walking on the track," were for the jury, although the custom did not exactly prescribe the proper distance ahead. Moreover, the foreman himself testified as follows: "Well, I don't recall hearing [the inspector foreman] give any signal; but yet, at the same time, I will add that we had been talking to these men that were going up between the tracks, crowded them over, and it seemed as though we didn't move without saying something; but I don't remember, nor I didn't at the time, but we usually did in all cases." It is true, subsequently, when asked by counsel for defendant, "As a matter of fact, you gave all the warning that it is customary for you to give when switching on that track?" he answered, "Yes, sir." His testimony, taken as a whole, was plainly for the jury. It would be palpable distortion to treat it as showing that the usual and customary signals were actually given.

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In addition, there was testimony of the car repairers working on track 5 "that they did not see the usual and customary signal and warning given." The inference to be drawn from their testimony was fairly for the jury. "It was not necessary for plaintiff to show by an eyewitness exactly how these injuries were received in order to recover, and that is really what was demanded by defendant's counsel on the argument here. It is not necessary in any action, civil or criminal, that the material facts should be established by direct evidence. In civil cases it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove, and it is the duty of the jury to decide according to the reasonable probability of the truth." Lillstrom v. Northern Pacific R. Co., 53 Minn. 464, 55 N. W. 624, 20 L. R. A. 587.

2. The contributory negligence of the deceased was also for the jury. It must be assumed, in considering this controversy, that no warning had been given him. If he came from the north, it was for that body to determine whether he was negligent in not observing that the train was moving, and in proceeding, although no warning was given him. On this reasoning alone, plaintiff's negligence was for the jury.

If, however, deceased came from the south, the case does not present the familiar proposition that where there are two equally practical ways of doing work, and the one is safe and the other perilous, it may be contributory negligence as a matter of law not to use the safe one. It is true that deceased might have gone north at the east end of the tracks without any danger. But, if he had, he must afterwards have gone south and have been confronted by the same peril as if he had originally started north from the south. It is also true that he might have walked up the plank tramway track and across northerly with entire safety if defendant had given the usual signal. This is not the ordinary case in which it is dangerous to pass between cars in the process of being switched. The yard was a place where repairs were made, and where men were authorized to, and customarily did, pass between cars, even on the switching track. The deceased was not bound to anticipate negligence on the part of his master. The law, however, required him to use his faculties of observation. He was not, as a matter of law, free from contributory negligence.

The question was for the jury. Switching was in course of being

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done. The jury might have found that deceased was negligent in not observing from existing conditions that it was dangerous to undertake to pass between the cars; but it found otherwise. Moreover, the presumption is that deceased "was exercising ordinary care and caution when attempting to cross the rails and that he was not guilty of contributory negligence." Lillstrom v. Northern Pacific Ry. Co., 53 Minn. 464, at page 468, 55 N. W. 624, at page 625, 20 L. R. A. 587. And see Hooper v. Great Northern Ry. Co., 80 Minn. 400, 83 N. W. 440 (in which the facts were somewhat similar to the facts in the instant case); Goff v. St. Louis, 199 Mo. 694, 98 S. W. 49, 9 L. R. A. (N. S.) 245; Axelrod v. New York, 109 App. Div. 87, 95 N. Y. Supp. 1072. But see Wiwirowski v. Lake Shore, 124 N. Y. 420, 26 N. E. 1023, at page 1024.

3. The remaining question, whether the trial court erred in not granting a new trial because of misconduct of plaintiff's counsel, who "in the ardor of his advocacy exceeded all proper bounds, and in the most inexcusable manner attempted to make the jury believe that the bell could not have been rung because, if it had been, the defendant would have produced the engineer and fireman to prove that fact."

No issue concerning the ringing of the bell was involved in the trial. The memorandum of the learned trial judge explains: "The remarks of counsel are evidently not accurately transcribed. Whatever they were, they were apparently prompted by some remark of counsel for defendant in his argument to the jury. What that remark was does not appear from the record. The court charged the jury specifically as to the negligence on which alone they could predicate a recovery, and in my judgment the remarks of counsel for the plaintiff could not prejudice the defendant." No sufficient reason appears for holding this view erroneous.

An assignment of error is addressed to a ruling on evidence. No prejudicial error is made to appear.

Affirmed.

On March 19, 1909, the following opinion was filed:

PER CURIAM.

After consideration of defendant's motion for reargument, we have found no reason for changing our original opinion that, in view of the

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circumstances of the accident, of the direct evidence, limited as it was, and of the presumption that deceased was exercising due care, the question of defendant's negligence was for the jury and that plaintiff was not as a matter of law guilty of contributory negligence. Defendant has urged the assignment that the trial court erred in refusing to instruct the jury upon the issue of contributory negligence as defendant requested. The request was made after the court had completed its charge. Immediately thereupon the trial court gave further directions on the subject to which defendant made no objection and took no exception. Apparently it was satisfied. Apart from the question whether any basis exists upon which to rest the assignment of error—and we are not inclined to be technical in this regard—the charge of the court considered as a whole fairly presented the issue as to contributory negligence to the jury.

Motion denied and stay vacated.

MARY RINES v. WILLIAM H. FERRELL.[1]

March 5, 1909.

Nos. 15,920—(231).

Parol Evidence of Matters Not Included in Writing.

Action by the executrix of the will of a deceased partner against the surviving partner for an accounting as to the partnership property. Defense, that all the assets of the firm were sold to the defendant in the lifetime of the deceased partner. Judgment for the defendant. *Held*, a written agreement, given in part performance of an oral one, which included the subject-matter of the written one and other matters not intended to be embraced in the written one, will not exclude parol evidence of the oral agreement in respect to such other matters.

Findings Sustained by the Evidence.

The findings of fact upon which the judgment is based are sustained by the evidence, and the trial court did not err in admitting parol evi-

[1] Reported in 119 N. W. 1055.

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dence tending to show a sale of assets other than those referred to in a written agreement.

Action in the district court for Mille Lacs county by the executrix of the last will and testament of Charles H. Rines, deceased, for an accounting of the affairs of the copartnership. The answer alleged that deceased had sold defendant all his interest in the copartnership and that it had been dissolved. The case was tried before Taylor, J., who found in favor of defendant. From a judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

Harris Richardson and *Harold C. Kerr,* for appellant.

E. L. McMillan, for respondent.

START, C. J.

The defendant and Charles H. Rines, now deceased, were at one time partners in the potato business at Princeton, this state. The copartnership was dissolved August 17, 1904. Thereafter, and on January 9, 1907, Rines died testate, and the plaintiff was appointed executrix of his will. She brought this action as such executrix in the district court of the county of Mille Lacs against the defendant for an accounting as to the business and property of the copartnership.

The answer admitted the copartnership and its dissolution, but denied that after such dissolution Rines retained or had any interest in any of the property of the partnership. It further alleged that the partners orally agreed that in consideration of $17,000, to be secured and paid to Rines, and the assumption of the debts of the firm by the defendant, Rines would sell and deliver to him all of his interest in the business and property of the firm, and would procure a conveyance to the defendant from Mrs. Rines of certain lots upon which a warehouse stood which was used in the business of the firm; that the legal title to the lots should remain in Mrs. Rines, and the legal title to an undivided half of the warehouses owned by the firm should remain in Rines as security for the payment of the $17,000; that contracts should be executed for the conveyance of the lots and the undivided half of the warehouses to the defendant upon the payment by him of the $17,000 according to the terms of the promissory notes to be given as evidence thereof; that upon the execution and delivery of the notes and contracts the partnership should be dissolved, and

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that all the title and interest of Rines in and to the partnership assets should vest in the defendant, except ten cords of wood, which was to be the property of Rines, and except as held for security for the payment of such consideration; and, further, that such oral contract was fully executed and performed by the parties thereto.

The reply denied the allegations of the answer as to a sale by Rines of his interest in the firm property other than the warehouses.

The cause was tried by the court without a jury, and findings of fact and conclusions of law made to the effect that the plaintiff was not entitled to an accounting, that the allegations of the answer were true, and that judgment be entered for the defendant. Judgment was entered accordingly, from which the plaintiff appealed.

The findings of fact are to the effect that the entire interest of Rines in the property of the copartnership, except as stated, was sold by him to the defendant. If such finding is sustained by the evidence, it follows that the conclusion of law of the trial court and the judgment entered pursuant thereto are correct. The assignments of error are to the effect that such finding of fact is not supported by any competent evidence; hence the conclusion of law was wrong, and the defendant is entitled to an accounting. If the evidence received by the trial court was competent, it is sufficient to sustain the finding.

This brings us to the pivotal question in the case: Was the evidence competent? The claim of the plaintiff is, briefly stated, that the partners entered into a written contract whereby Rines sold his interest in the warehouses, and perhaps his interest, $7,000, in the cash claim of the firm—that is, as we understand, its bank account, and nothing more —and, further, that the written contract was clear and complete on its face; hence parol evidence tending to show that Rines' interest in the other assets of the firm was sold to the defendant was incompetent.

The assets of the firm, other than the warehouses and cash, consisted mainly of accounts and bills receivable, claims, absolute and contingent, against railroads for rebates and shortages, wood and coal, office furniture, fixtures, and supplies. There were at the same time claims, absolute and contingent, against the firm, which the defendant agreed to pay. The written contract relied upon consists of Exhibits A and B, attached to the answer, and a memorandum, designated in

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the record as "Exhibit 12," which is in the words and figures following:

Princeton warehouse	5,000	5,000
Cambridge	30,000	1,500
Braham	1,000	500
No. Branch	1,000	500
Isanti	10,000	
Cash Claim	7,000	7,000
Forreston	500	250
		15,250

Ferrell to pay me $17,000 for my one-half interest therein, to pay all claims of firm of C. H. Rines & Co., and collect all accounts due them.

W. H. Ferrell.
C. H. Rines.

It was signed by the parties on the same day, but before the other writings referred to were executed. The partners then went to an attorney's office and there executed the writings; but Exhibit 12 was not shown or furnished to the attorney. Exhibit A is simply an executory contract, signed by the partners and Mrs. Rines, to convey the lots owned by her on which the Princeton warehouse stood to the defendant if he first made the payments and performed the covenants therein mentioned. The defendant on his part thereby agreed to pay Rines and his wife $17,000 in instalments as therein specified. In Exhibit B, Rines and wife were named as parties of the first part and the defendant the party of the second part. He thereby agreed to pay to the parties of the first part $17,000 in instalments, and they agreed in consideration thereof to sell and convey to him the entire interest in the Princeton warehouse and the one undivided one-half interest in the other warehouses. This last-named writing recited that a contract (Exhibit A) had been executed by the parties, covering the property in Princeton, which should be "accepted as accompanying this contract and construed with it." There was not a word in either contract relating to the partnership, its dissolution, or its other property.

It is quite apparent on the face of these exhibits that they do not purport to express any agreement as to any property of the firm other than

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the warehouses, and, taken in connection with the other evidence in the case, it is clear that their only purpose was to provide for the transfer of the lots belonging to Mrs. Rines, and an undivided one-half interest in the other warehouses, and to secure the payment of the $17,000. If, then, the defendant had offered parol evidence to show that it was intended that the writings should pass title to the other assets of the firm, the rule that parol evidence is inadmissible to vary the terms of a written instrument would apply in all its vigor.

Such, however, is not this case, which is one where a written agreement was given in part performance of an oral one, which included, not only the subject-matter of the written agreement, but other matter not intended to be embraced therein—namely, the assets of the copartnership other than the warehouses. The effect of the parol evidence was to show that the other assets of the firm were sold by an oral contract to the defendant, as well as the warehouses, in consideration of his promise to secure and pay $17,000 for the whole thereof and to assume the liabilities of the partnership, and, further, that the writings were executed in part performance of the oral contract. It follows that the parol evidence was properly admitted; for it was within the rule that a written agreement given in part performance of an oral one, which includes the subject-matter of the written one and other matters not intended to be embraced in the written one, does not exclude evidence as to the oral agreement in respect to such other matters. Healy v. Young, 21 Minn. 389.

The case cited was an action to recover rent upon a written lease of a newspaper plant. One of the defenses was that after the execution of the lease the defendant purchased the plant and paid $1,500 therefor, and, further, that in consideration of such purchase and payment the plaintiff released all claims growing out of the lease. The sale and purchase of the plant were evidenced by a written instrument in the form of a bill of sale, whereby the plaintiff, in consideration of $1,500 paid and secured by defendant, sold to him the newspaper plant, "including all material and all sums due said newspaper; [the purchaser] to pay all debts" of the plant. Parol evidence was received of the alleged agreement to release the claim for rent in consideration of such purchase. It was urged, on appeal to this court, as here, that the parol evidence was incompetent, because the parties had deliberately

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reduced their agreement to writing, and the reception of the evidence was an attempt to vary the terms thereof. This court held that the evidence was admissible, for the reason that it did not tend to vary or contradict the terms of the bill of sale, as the evidence referred to was a different subject-matter than that covered by the bill of sale.

In principle there is a striking analogy between that case and the one here under consideration. If Exhibit 12 was merged in Exhibits A and B, as plaintiff seems to claim, the parol evidence, nevertheless, was competent, and correctly received, for the reasons stated. If, however, Exhibit 12 was not affected by the subsequent writings, the same conclusion follows as to the admissibility of the parol evidence, for the reasons already stated, and, further, that Exhibit 12 does not purport on its face to be a completed contract. It is significant that the aggregate purchase price of the interest of Rines and his wife in the warehouses referred to in Exhibit 12 and cash claim, as itemized therein, was only $15,250, or $1,750 less than the $17,000 the defendant agreed to pay, besides assuming the liabilities. We hold that the evidence of the oral contract as to the assets of the firm, other than the terms of the memorandum, was properly received. Beyerstedt v. Winona Mill Co., 49 Minn. 1, 51 N. W. 619; Potter v. Easton, 82 Minn. 247, 84 N. W. 1011.

Judgment affirmed.

TONY PINTAR v. PITT IRON MINING COMPANY and Another.[1]

March 5, 1909.

Nos. 15,921—(234).

Defective Fuse—Verdict.

The plaintiff was injured while working in the defendant's iron mine by reason of a defective fuse furnished by the defendant with which to explode dynamite. *Held*, that the evidence is sufficient to support the verdict for the plaintiff, and that the trial court committed no reversible error.

[1] Reported in 119 N. W. 1053.

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Action in the district court for St. Louis county against defendant mining company and John Eastman, its mining captain, to recover $25,195 damages for personal injuries. The alleged negligence is stated in the first paragraph of the opinion. The case was tried before Ensign, J., who denied defendants' motion, made at the close of the testimony, for a directed verdict. The jury returned a verdict in favor of defendant Eastman and against defendant corporation for $7,000. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant corporation appealed. Affirmed.

Howard T. Abbott and *Ross & Dwyer,* for appellants.

L. H. Corcoran and *Theo. Hollister,* for respondent.

START, C. J.

The plaintiff, while working for the defendant Pitt Iron Mining Company in its iron mine near Elba, this state, was on August 21, 1907, injured by an explosion of dynamite. He brought this action in the district court of the county of St. Louis to recover damages for such injury, on the ground that it was caused by the alleged negligence of the defendant in furnishing him with a fuse which was defective and unsafe with which to do his work, and in failing to warn and instruct him as to the dangers incident to the work of blasting. The answer denied any negligence on the part of the defendant, and alleged that plaintiff's injury was due to his own negligence, and, further, that he assumed the risks. Verdict for the plaintiff for $7,000. The defendant appealed from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

The first contention of the defendant is that the verdict is not sustained by the evidence, for the reason, as stated by counsel, that "there is no justification for this verdict, as the negligence alleged in the complaint was not proven. I apprehend that it is yet the rule that the happening of an accident does not create a case of liability or sufficient cause for submitting a personal injury case to the jury." The apprehension of the counsel is correct, and, if the record does not disclose evidence tending to establish evidentiary facts from which the jury might have reasonably inferred that the defendant was negligent as alleged, the verdict must be set aside. The record discloses evidence tending to show the facts following:

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The plaintiff is twenty seven years old. He was born in Austria, where he worked at farming until he came to this country, about a year before he was injured, and went to work for the defendant at its iron mine. He first worked as a trackman, then on the dump, and afterwards about the steam shovel as a pitman. He worked at the steam shovel three days, and was then directed by the defendant's representative, the night shift captain, to work at blasting on the night shift. He had never done any blasting, nor used powder, prior to that time. He so told the representative, and that he did not want the job of blasting. He was assured that it was an easy job, and that he must take it, or he would be given his time. He took the job. The fuse to be used in discharging blasts were kept in large quantities by the defendant in its powder house, where it was accessible to the powder man or the men who did the exploding. The fuses stored in the powder house were of the best make. The plaintiff was furnished with a key to the powder house, and in case he needed fuses from there he could go and get them. A box, however, which was not covered at the time of plaintiff's injury, was kept conveniently near the place where the blasting was to be done. The day powder man would cut off pieces of fuse of the proper length for blasting and deposit them in the box for the use of the men engaged in blasting. The plaintiff was told to get his fuses from the box. On the second night after he commenced blasting he used up the fuses in the box, and went to the powder house and got enough for the balance of that shift. On the night of his injury he got all of his fuses from the box he was directed to take them from. About three o'clock in the morning he had seven chunks of frozen earth or ore loaded on seven cars; one on each. It was necessary to break these chunks. He put a piece of dynamite on each chunk, and went to the box and got eight pieces of fuse, and attached a piece to each chunk, lit one end of the other piece, and with it set fire to each of the other seven in their order, and then sought safety under the last car and waited for the explosions. He heard six charges go off in regular order, and waited from seven to ten minutes for the seventh one to explode. He then came from under the car, and when four or five feet from the last fuse he had fired the dynamite exploded, whereby he was knocked down, one of his teeth knocked out, his nose injured, the sight of his left eye partially destroyed and that of his right eye

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entirely. The fuse used in connection with the charge, the explosion of which injured the plaintiff, was soft, sticky, bent, and broken about six inches from the end which was fired, and was, when taken from the box, in a defective and unsafe condition. The plaintiff, until the time of his injury, did not have any fuse miss or hold fire, nor had he been cautioned as to the danger from a fuse missing fire.

In making the foregoing statement we have assumed the credibility of the testimony of the plaintiff, which was a question for the jury. We are of the opinion that the jury might fairly draw, from the evidentiary facts stated, the inference of fact that the defendant failed to exercise due care with reference to the fuse kept in the box and in failing to warn the plaintiff, who had no experience in blasting or using explosives, as to the dangers incident to the work he was set to do, and was therefore guilty of negligence as alleged in the complaint. Laitinen v. Shenango Furnace Co., 103 Minn. 88, 114 N. W. 264. The case of Murphy v. Great Northern Ry. Co., 68 Minn. 526, 71 N. W. 662, relied upon by the defendant is clearly distinguishable from this case, for its facts do not justify any reasonable presumption that the defective fuse had been placed in the box by any unauthorized person. Clearly the question of the plaintiff's contributory negligence and whether he assumed the risks was one of fact.

We hold that the verdict is sustained by the evidence. Many errors are assigned and urged as to the rulings of the trial court in the admission of opinion evidence, and also in its instructions to the jury. We have examined them in detail, and our conclusion is that no reversible error was committed by the trial court either in its rulings or its instructions to the jury. The basis of most of the alleged errors is that there was no evidence warranting the reception of the opinion evidence objected to, or for the giving of the instructions excepted to. We have stated the facts which there was evidence tending to prove, and we are of the opinion that such evidence justified the rulings and instructions of the court, of which the defendant complains as not justified by the evidence.

Order affirmed.

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TOM RASE v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.[1]

March 5, 1909.

Nos. 15,923—(137).

Guarding Dangerous Machinery—Questions for Jury.

Plaintiff, a coal shoveler at an elevator, also in charge of an engine operating it, went into a small engine house to remedy something "which didn't sound right," stumbled and fell, he contended, on an unguarded belt and revolving pulley, and was hurt. In an action to recover damages it is *held:*

1. The facts brought the case within the local factory act (section 1813, R. L. 1905), "which was intended to protect from personal injury the workman or employee in any shop, mill, or factory by reason of dangerous machinery therein, and which must be construed to give effect to such wise and humane purposes." Christianson v. Northwestern Compo-Board Co., 83 Minn. 25, followed and applied.

2. Evidence designed to show that it was practicable and feasible to have so guarded this machinery as to have protected the servant was admissible.

3. The four walls of the engine house did not, as to plaintiff, constitute a compliance with the statute.

4. The burden of proof is on the person injured to show by a fair preponderance of evidence only that the alleged negligence was the proximate cause of the injury complained of. Where a cause is shown which might produce a given accident, and the fact appears that an accident of that particular character did occur, it may be a warrantable inference, in absence of showing of other cause, that the one known was the operative agency in bringing about such result.

5. Whether this defendant was negligent, and whether the failure to guard the pulley and belt was the proximate cause of this plaintiff's injury, were questions for the jury.

6. Assumption of risk and contributory negligence are separate and distinct defenses. Both are peculiar to an action on the tort and are usually implied from conduct. Assumption of risk rests upon intelligent acquiescence with knowledge of the danger and appreciation of the risks naturally incident to the employment or arising from a particular situation in which the work is done, negatives a prima facie liability of the master, and does not involve the aggravation or creation of the peril by misconduct of the servant. Contributory negligence of the servant

[1] Reported in 120 N. W. 360.

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rests on a breach of duty to take care, displaces a prima facie liability of the master, adds a new danger to the situation not necessarily incident to the work, and is imposed by law upon the servant, however unwilling or protesting he may be.

7. Assumption of risk is based, not upon the contract, but on the principle expressed by the maxim, Volenti non fit injuria.

8. The test of knowledge of danger is not the exercise of ordinary care to discover danger, but whether the danger was known to or plainly observable by the employee. The test of appreciation of risk is whether the servant understood the risk, or by the exercise of ordinary observation ought to have understood it.

9. The tendency of the English authorities here reviewed, and in a less degree of the American cases, is to submit to the jury questions arising from the application of the doctrine of assumption of risk to facts which are disputed, or from which reasonable minds might draw different inferences.

10. Plaintiff's assumption of risk and contributory negligence were for the jury.

Action in the district court for Ramsey county to recover $60,400 damages for personal injuries sustained while at work in defendant's coal elevator. The case was tried before Kelly, J., who directed a verdict in favor of defendant. From an order refusing to set aside the verdict and to grant a new trial, plaintiff appealed. Reversed.

William E. Dampier and *Leonard J. Dobner,* for appellant.

A. H. Bright and *Munn & Thygeson,* for respondent.

JAGGARD, J.

Plaintiff and appellant, a servant of defendant and respondent railway company, sought to recover for personal injuries. At the close of the evidence the court directed a verdict for defendant. This appeal was taken from an order refusing to set aside that verdict and to grant plaintiff a new trial.

Plaintiff's work, for a period of about three months, had been to shovel coal into the coal buckets of an elevator operated by a gasolene engine in a concrete building twelve feet square. For present purposes it must also be regarded as a fact that he was in charge of the engine. On this occasion he had started it, taken his torch, and gone to work. The light was not one of the issues in the case as finally present-

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ed. While he was shoveling, he observed that the engine "didn't sound right." He returned to the engine house, and when he had taken one or two steps in from the door he "stepped on something and fell." The belt and pulley were a short distance above the floor. The lower side of the belt moved from the top downward, and, passing around the driving wheel, went over the big wheel to the upper part and front of the building. What it did with him was "more than [he] could tell." He was badly injured. Inter alia, part of the brain escaped through the right ear. He was found unconscious, bleeding, and dirty on a bench in the engine house. His ear was found under the lever, together with a lot of blood. The trial court directed a verdict for the defendant.

1. The initial question in the case is whether such actionable negligence was shown on the part of the defendant as to require submission to the jury. Plaintiff claims that the factory act (section 1813, R. L. 1905) required respondent to make an additional protection for this engine within the inclosure built for it. Defendant argues that this statute did not apply, and that under any circumstances the building complied with its provisions and rendered a second guarding unnecessary. A majority of the court are of the opinion that the terms of the statute are broad enough to apply to this case.

In Christianson v. Northwestern Compo-Board Co., 83 Minn. 25, 27, 85 N. W. 826, 827, 85 Am. St. 440, Start, C. J., said: The statute "was intended to protect from personal injury the workmen or employees in any shop, mill, or factory by reason of dangerous machinery therein, and it must be so construed as to give effect to such wise and humane purpose." The writer of this opinion thinks that this was an engine room, and not a workshop, and that the statute did not apply. He is also of the opinion, however, in view of the positive duty, apart from the statute, which rests on the master to exercise due care in providing a reasonably safe place for the servants' work, that, although the master was not necessarily liable for the failure to guard, it was a question for the jury to determine what protection should have been afforded and whether a guard was reasonably necessary. Smith v. Baker, 1891 App. Cas. 325, at page 353; Lloyd v. Woolland Bros., 87 L. T. (N. S.) 73; Wheeler v. Wason, 135 Mass. 294, 296; Nadau v. White River, 76 Wis. 120, 126, 43 N. W. 1135, 20 Am. St. 29; Ander-

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son v. C. N. Nelson Lumber Co., 67 Minn. 79, 81, 69 N. W. 630, per Mitchell, J.; 1 Labatt, Master & Servant, § 76, and cases cited.

It appears from the record that no railing or other device was provided. No particular difficulty has been suggested in the matter of providing an adequate safeguard against the occurrence of just such an accident as here took place. Evidence that it was practicable and feasible so to guard this machinery as to provide reasonable protection against such a fall as plaintiff experienced was admissible. The trial court erred in excluding it. In Myers v. Hudson, 150 Mass. 125, 128, 22 N. E. 631, 15 Am. St. 176; Allen, J., said: "In order to aid the jury in determining whether defendant had exercised reasonable care in providing and maintaining the machinery in actual use, it was competent to show what other kinds of machinery or appliances were used elsewhere, and might have been used here." This general rule has been specifically applied to evidence as to guards of machinery in use. Wheeler v. Wason, 135 Mass. 294. And see Peterson v. Johnson-Wentworth Co., 70 Minn. 538, 541, 73 N. W. 510; Barbo v. Bassett, 35 Minn. 485, 29 N. W. 198; Poczerwinski v. C. A. Smith L. Co., 105 Minn. 305, 117 N. W. 486.

The four walls of the building were no more an adequate guard, because the building was small, than if the building had been large. That they protected men working on the outside did not tend to show that they would protect men working on or about the engine. Indeed, the limited space within which the plaintiff worked was likely to increase the peril to which he was exposed.

It is urged, however, that defendant's negligence in failing to guard the machine was not sufficiently shown to have been the proximate cause of the injury of which he complains. Circumstantial evidence tended directly to show that plaintiff was injured by coming in contact with the moving belts and machinery. How else the accident could have occurred has not been suggested. That there is an unwritten page in this narrative is obvious. But whether it was negligence not to provide a guard, and whether, if that negligence was proved, it was the proximate cause of the injury, were for the jury on authority and on principle.

"Proof of proximate cause is subject to no more burdensome rule than is applied to the proof of any other essential fact in an ordinary

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law action. It must be established by a preponderance of the evidence, direct or circumstantial. * * * A cause being shown which might produce an accident, and it further appearing that an accident of that particular character did occur, it is a warrantable inference, in the absence of showing of other cause, that the one known was the operative agency in bringing about such result." Weaver, J., in Lunde v. Cudahy (Iowa) 117 N. W. 1063, at page 1068. In Bolen-Darnell Coal Co. v. Williams (C. C. A.) 164 Fed. 665, 669, the servant walked along a narrow path, slipped, and was precipitated into a pit and on a wheel. The question of cause was submitted to the jury. In Swick v. Ætna, 147 Mich. 454, 111 N. W. 110, plaintiff was opening an air cock in a pipe leading into a vat. His wrench slipped, and he came in contact with an unguarded belt running on pulleys. In holding that the unguarded belt was the proximate cause of the accident, Hooker, J., said, at page 462: "Nor should it be said that the slipping of the wrench and not the unguarded belt was the proximate cause of the injury. Manifestly, if this man had not fallen or slipped, or if something out of the ordinary had not happened, he would not have come in contact with the belt; but that is always the case where one is hurt by machinery. Something happens which causes him to get against or into it, and this case is not distinguishable, in that respect, from Swoboda v. Ward, 40 Mich. 420, where a plaintiff stepped into some unguarded cog wheels." And see Miller v. Kimberly, 137 Wis. 138, 118 N. W. 536, 538.

2. The learned trial court after careful consideration held that as a matter of law plaintiff assumed the risk. As it will be subsequently pointed out, his conclusion was sustained and opposed by an almost equal number of decisions of this court on similar facts. This is one of the class of constantly recurring cases in which counsel are unable to advise their clients and courts unable to agree or decide consistently. It would be easy, but inadequate, to dogmatically determine this particular question without considering the "veritable chaos of conflicting precedents" which have applied the doctrine. It may tend to clarification of the subject to consider at some length its ultimate basis, its character as a distinctive defense, its standards, and the extent to which assumption of risk is a question for the court or for the jury.

In the first place it is insisted at the one extreme that its ultimate basis is economic, not juristic (1 Labatt, Master & Servant, §§ 62,

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156), and that sound public policy demands, if not its abolition, its restriction and modification to a considerable degree. The tendency of academic discussion in this direction is perhaps not more pronounced than of that of many decisions. In Yarmouth v. France, 19 Q. B. Div. 647, 653, for example, Lord Esher said: "It is to my mind a horrible way of stating the duty, to say that a master owes no duty to a servant who knows that there is a defect in machinery and, having pointed it out to one in authority, goes on using it. It seems cruel and unnatural, and in my view utterly abominable." Among the many objections urged are these: The original rule was artificial in origin and is unjust in operation, because it imposes upon the servant the risks of employment with compensation for consequent injury with which the industry should be charged. The servant does not in any common-sense way exercise any volition. He must work where danger exists, or in some other place with corresponding peril, or remain idle. See Lindley, J., in Yarmouth v. France, supra. The reasoning by which it is sought to be justified, carried to its logical conclusion, tends to result in this paradox: The more grossly the master is negligent, the more certain is the assumption of risk by the servant and the master's exoneration. If the master be more careful, then the more doubtful is the servant's assumption of risk, and the more probable is the master's liability. The employer who is successfully careful and he who is extremely careless are equally protected. The exercise of care is discouraged, and a premium is put on negligence.

At the other extreme many authorities regard the rule as founded in nature because the general risks inherent in the employment are necessarily assumed. There is a natural difference between the necessary dangers involved, for example, in working at a height, as on a steeple, and on the level or in a sand pit; in handling dynamite, or in driving a mule; in operating machinery which revolves or moves, or in selling dry goods behind a counter; in ordinary operations and in peculiar exigencies. The master has a natural right to conduct his business in his own way and the servant to refuse to work under its conditions. Moreover, the rule is so permanently fixed as to render iconoclastic attempts to modify or repeal it or to refuse to follow its reasoning to the logical extremity of holding assumption of risk to be a matter of law. Compare Schlemmer v. Buffalo, R. & P. Ry. Co., 207 Pa. St. 198, 56

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Atl. 417, with the same case in 205 U. S. 1, 12, 15, 27 Sup. Ct. 407, 51 L. Ed. 681.

It is undoubtedly true that the doctrine is so well established that to abrogate it would be judicial legislation. The difficulty arises because the premises on which the rule, regarded as juristic, is based are so confused and indefinite that to deduce from them with metaphysical consistency is almost certain to result in practical absurdity. None the less a faithful effort, accompanied by neither hostility to nor advocacy of the abstract merits of the doctrine, must be made to discover and apply the law as the courts, taken as a whole, have determined it to be.

In the second place, the question naturally arises whether assumption and contributory negligence are separate defenses, and, if they are, what is the essential distinction between them. In the leading case of St. Louis Cordage Co. v. Miller, 126 Fed. 495, 515, 61 C. C. A. 477, 510, 63 L. R. A. 551, Sanborn, Circuit Judge, said of three cases decided by the supreme court of the United States and of other cases that they so confused the two separate defenses as to be without persuasive force. Thayer, Circuit Judge, dissenting, said: "I do not regard the question whether 'contributory negligence' and 'assumption of risk' * * * are identical or are different defenses as of much practical importance. That is rather a question for the schoolmen." Without reasonable controversy, current opinion, judicial and academical, has insisted that the defenses must be regarded as distinct, and that an injured servant who has not been guilty of contributory negligence may be precluded as a matter of law from recovery of damages from his master because he had assumed the risk. For example, see Miller v. White (Iowa) 118 N. W. 518, at page 523; Chicago v. Heerey, 203 Ill. 492, 68 N. E. 74, collecting cases. It is true, however, that in some jurisdictions—for example, in Wisconsin—only "some degree of distinction is observed" (Campshure v. Standard, 137 Wis. 155, 118 N. W. 633); that "even the Massachusetts cases have occasionally wobbled" (8 Harvard L. Rev. 469 [5]); and that members of the federal supreme court are not agreed as to the exact nature of the distinction. See Schlemmer v. Buffalo, R. & P. Ry. Co., 205 U. S. 1, 6, 12, 16, 27 Sup. Ct. 407, 409, 410, 51 L. Ed. 681. "The extraordinary prevalence" of failure to observe this primary distinction has been one of the many causes of confusion in thought on this subject. In a particularly valua-

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ble note to be found in 49 L. R. A. 33, from page 46 to 62, inclusive, Mr. Labatt considers the relations of contributory negligence and assumption of risk, demonstrates that courts and counsel have been guilty of inexcusable remissness in neglecting the natural distinctions between the doctrines, and puts in a strong light the deplorable consequences, sometimes amounting to a miscarriage of justice, which inaccurate terminology and logical laxity have contributed to produce.

The exact nature of the distinction, however, is not generally agreed upon. It is often said that assumption of risk is a matter of contract; contributory negligence of tort, or of conduct. This is fallacious. As will subsequently be pointed out, assumption of risk cannot rest on contract in this particular group of cases at least. Both defenses are equally peculiar to the law of tort. Both are usually implied from conduct. A view at least less indefensible is this: Failure to exercise due care, which the law has imposed as a duty, is the necessary differentia which distinguishes the species, negligence, from the genus, tort. It is equally an essential characteristic of contributory negligence. It has no logical connection with assumption of risk. Carelessness is not the same thing as intelligent choice. Bowen, L. J., in Thomas v. Quartermaine, 18 Q. B. Div. 685; In re Morgan, 26 Colo. 415, 58 Pac. 1071, 47 L. R. A. 59, 77 Am. St. 269. Voluntary assumption negatives the idea of even prima facie liability. Contributory negligence displaces liability prima facie established. The former is mere passive subjection by the servant to risk of injury inherent in known defective conditions. The latter is an act or omission on complainant's own part tending to add new danger to his situation not necessarily incident to conditions, and bringing upon himself a harm caused not solely by them, but created in part, at least, by his own misconduct. Mr. Francis Bohlen, in 21 Harvard L. Rev. 246, 249; Mr. Chas. Warren, in 8 Harvard L. Rev. 458. Contributory negligence is a breach of legal duty to take due care, imposed by law upon the servant, however unwilling or protesting he may be. Assumption of risk is not a duty, but is purely voluntary upon the part of the servant. The doctrine of assumption of risk rests on intelligent acquiescence with knowledge of danger and appreciation of the risks. The distinction varies from being clear and vital at one extreme to being vague and insignificant at the other. This is equally true of the shadowings of many other legal principles. It

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must sometimes occur that the circumstances of a case affecting the defenses are as interwoven and the defenses themselves so interrelated that for purposes of convenience the two defenses may be conveniently considered at the same time.

In the third place, the question is whether the doctrine rests on contract or on the principle expressed by the civil-law maxim, "Volenti non fit injuria." In Thomas v. Quartermaine, L. R. 18 Q. B. Div. 685, 698, Bowen, L. J., said: "It is in most cases a barren and metaphysical inquiry to discuss whether such duties are best treated as arising by implication from the contract or from the general law outside." While there is obviously much wisdom in this comment as a criticism of current legal thought, the fact remains that in a number of classes of cases (see note to O'Maley v. South Boston [158 Mass. 135] 47 L. R. A. 161, at page 164), and in the class of cases in particular to which the instant case belongs, the conclusion to be reached depends upon the decision on which of the two bases the doctrine is to be rested, as will subsequently appear.

The doctrine of estoppel is sometimes, but decreasingly, used to account for the rule. Beach, Cont. Neg. § 16; Busch v. Robinson, 46 Ore. 539, 81 Pac. 237. Estoppel, however, prevents the successful assertion of an accrued right. Assumption of risk prevents the accrual of the right. Moreover, it will be found to resolve itself into either or both the contract or the maxim theory. At best, the term enriches the vocabulary, but tends to confuse the reasoning, by introducing the use of an ambiguous middle.

Nothing is gained by treating assumption of risk as "part of the body of law incident to the status or relationship of master and servant." 5 Columbia L. Rev. 159. The suggestion involves at the best an identical proposition. Moreover, if the doctrine should be regarded as based on the civil-law maxim, it is not peculiar to the relationship. See Lord Halsbury, in Smith v. Baker, 1891 App. Cas., at page 337.

The late and lamented Dean Huffcut adopted the view that the contract feature should be regarded as controlling defects and dangers which existed at the commencement of the service and the maxim those subsequently arising. Huffcut, Agency, 354. While there is some judicial sanction for the device, it has not been enforced with any considerable degree of unanimity or consistency, nor does it avail to

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solve the difficulty involved in the controversy over the master's failure to comply with various factory acts, as will subsequently appear.

In this class of cases Judge Taft's opinion in Narramore v. Cleveland, C. C. & St. L. Ry. Co., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68, has demonstrated that assumption of risk by the servant is excluded as a defense if the hypothesis be that the doctrine rests on contract; for the agreement by the servant that his master violate a penal statute is necessarily illegal and void. Sipes v. Michigan, 137 Mich. 255, 100 N. W. 447. On this basis, it is not clear what answer can be made to the authorities holding that a servant cannot be held to have assumed the risk of the master's negligence generally because of his inability to contract against his master's wrong: Buswell, Personal Injuries, § 207; Brents v. Louisville, 31 Ky. L. R. 1216, 104 S. W. 961; Kirby v. Manufacturers, 127 Mo. App. 588, 106 S. W. 1069; Garaci v. Hill, 124 Mo. App. 709, 102 S. W. 594. See Limberg v. Glenwood, 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 44; San Francisco & P. S. S. Co. v. Carlson (C. C. A.) 161 Fed. 851, 854; 8 Current Law, 908 (a fortiori against his wilful wrong); Roff v. Summit, 119 La. 571, 44 South. 302. See Lord Herschell, in Smith v. Baker, 1891 App. Cas., at page 362. In Choctaw O. & G. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96, the federal supreme court has recognized the rule last stated, but has in effect abrogated it by an exception. Cf. Texas & P. Ry. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188.

There are significant objections to resting the doctrine on the maxim, volenti non fit injuria. Why should the servant be permitted, by assenting to his master's wrong, to connive with his master to evade statutory obligations, and bind himself to do what he could not bind himself to do by agreement for a consideration? See Baddeley v. Granville, 56 L. J. (N. S.) 501, per Willes, J Why should the master be held liable if he orally promises to correct the evil complained of by the servant and be exempted from an obligation imposed by positive statute? 61 Cent. L. J. 448. The only answer is that such is the well-established rule of law.

It is upon the maxim that later English cases consistently and expressly sustain the interposition of this defense by the master in cases under the factory acts. The earlier English cases and the American

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cases generally do not appear to have deliberately answered the question, and have based decisions indifferently upon either or both the contract and the maxim. Ordinarily this confusion has been harmless. It has, however, occurred where the distinction was important, as in cases under the various factory acts. For example, in St. Louis Cordage Co. v. Miller, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551, the syllabus written by the circuit judge sets forth that exemption of risk rests on contract. Subsequently the opinion rests the doctrine both on the maxim, volenti non fit injuria, and upon contract. In the case immediately following, Glenmount L. Co. v. Roy, 126 Fed. 524, 528, 61 C. C. A. 506, 510, the same judge rests the doctrine on "the right to contract."

The authorities of this country, however, are generally veering around to accord with the opinion that "the consent must be bottomed on the maxim 'volenti non fit injuria'—that to which the party assents is no wrong." Per Deemer, J., in Miller v. White (Iowa) 118 N. W. 519, 523. The doctrine is no more based on contract than is the action of the servant resulting from a breach of duty ex contractu. Martin v. Chicago, 118 Iowa, 148, 98 N. W. 1034, 59 L. R. A. 698, 96 Am. St. 371, 376. The best-considered case on the subject (Dempsey v. Sawyer, 95 Me. 295, 49 Atl. 1035) thus summarizes the law: "The risk of injury to a servant from defective machinery is primarily upon the master, and remains upon him unless the servant voluntarily assumes it. The servant may voluntarily assume such risk, and relieve the master from it; but such assumption is his voluntary act, not his legal duty." And see Birmingham v. Allen, 99 Ala. 359, 13 South. 8, 20 L. R. A. 457. In Denver & R. G. R. Co. v. Norgate, 141 Fed. 247, 253, 72 C. C. A. 365, 6 L. R. A. (N. S.) 981, a factory act case, Carland, J., regarded the Narramore case and Green v. Western, 30 Wash. 87, 70 Pac. 310, as arising from the false doctrine that the law of assumption of risk is "created by the contract between master and servant," and said: "It is independent of the will of either. It is not a term of the contract of employment. * * * It is a principle of common law. * * * It is over and above the contract, and depends in no manner for its existence upon agreement of the parties. It is founded upon public policy, the status assumed by master and servant, and upon the maxim 'volenti non fit injuria.'"

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The fourth question is whether, in the absence of proof of actual knowledge of damages and appreciation of the risk, the doctrine of assumption of risk imputes to the servant the knowledge and appreciation resulting from the exercise of the care of the ordinarily prudent man. Obviously, if he is so held, the distinction between contributory negligence and assumption of risk breaks down, and assumption of risk may become a question of care. Some opinions by judges who recognize that the two defenses are separate have, however, held the defendant to the standard of that favorite of the law. Apart from the hopeless logical inconsistency, the practical effect of such a rule involves a reversal of undisputed and indisputable elements of the law of negligence of the master. The master and servant do not stand on the same footing. The master, not the servant, owes a duty of inspection, and the servant has a right to assume that the master has exercised due diligence in providing reasonably safe appliances and in inspecting his premises and instrumentalities. He is not bound to anticipate his master's negligence. He is not, in theory, at least, required to exercise due care in investigating his master's actual carelessness. He "is bound to use his eyes and to see that which is open and apparent to any person using his eyes." Dillenberger v. Weingartner, 64 N. J. L. 292, 45 Atl. 638. "But he is not required to look for danger." Bolen-Darnell Coal Co. v. Williams (C. C. A.) 164 Fed. 665; Riley v. Cudahy (Neb.) 117 N. W. 765, 788. It is the master's duty to both observe and inspect; the servant's, merely to observe. Bailey, Master's Liability, 107, 108, 109; Illinois v. Mann, 100 Ill. App. 367, affirmed 197 Ill. 186, 64 N. E. 328.

By reversing this reasoning, certain courts appear in this particular class of cases to have achieved the dialectical feat of absolving both the master and the servant from the duty of being careful, and of abolishing the law of negligence and of contributory negligence. For admittedly the servant assumes risks which are obvious and open; on this theory he also assumes what reasonable care would disclose; and it has been held that he also assumes latent defects which the master's exercise of due care would not have discovered. See Cryder v. Chicago, R. I. & P. Ry. Co., 152 Fed. 417, 81 C. C. A. 559. It is plain that in the last case initial negligence could not have been shown.

If knowledge which the servant would have acquired in the exercise

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of the care of an ordinarily prudent man is not the standard, by what criterion is that constructive knowledge to be determined? The old-fashioned formula as to the distinction between ordinary and extraordinary risks has by no means entirely disappeared, but is largely fading from vision, because in so many cases no one can tell where the one begins and the other ends. This is true, also, with respect to the distinction between usual and unusual risks. In Calloway v. Agar, 129 Iowa, 1, 104 N. W. 721, the rule is laid down that to make out assumption of risk the master must show either that the employee knew and appreciated the incidental danger or that the conditions were such that they rendered ignorance inexcusable. But in De Kallands v. Washtenaw, 153 Mich. 25, 116 N. W. 564, it was held that the actual ignorance of the servant of the danger of his employment will not alone suffice to relieve him from his assumption of the risk but that ignorance must be excusable. Excusable ignorance, however, finally resolves itself into the extent to which the danger and risk obtrudes upon the attention of the employee. This is true generally of other suggestions for a substituted standard.

In Laughy v. Bird, 136 Wis. 301, 117 N. W. 796, 797, Marshall, J., said of the consideration that, if the employee has as good or better opportunity to know of the defects as the master, he assumes the risk: "That is good law; but it does not suggest that defects which are discoverable by the exercise of such care as is required to be exercised by the master are necessarily discoverable by such attention to his surroundings as an employee is bound to exercise. Defects may be such as to be perfectly plain to the former and not attract the attention of the latter, since no duty of inspection rests with the servant to turn aside from the acts of operating in order to specially look or search for defects, in the absence of some circumstances reasonably efficient to suggest existence thereof. The employee is only required to see and comprehend those imperfections which are so significant as to ordinarily attract the attention of a person under the same or similar circumstances, in the exercise of ordinary care, and whether the servant in any particular instance is chargeable with knowledge of conditions imperiling his personal safety is, generally, although, of course, not always, a jury question." With the exception of the confusion of assumption of risk with contributory negligence, this statement is a par-

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ticularly clear variation of the natural and generally accepted standard. Of this, there are a number of equivalent formulæ, as whether the danger or defect was so "clear, plain, obvious," or "so readily observable" as to be apparent to a person of ordinary intelligence (Christiansen v. William, 7 Am. & Eng. An. Cas. 69), or "such as is apparent to observation" (Davidson v. Cornell, 132 N. Y. 228, 30 N. E. 573), or "in the exercise of common observation, any man of ordinary intelligence would completely understand, and appreciate the situation" (Hermann v. Clark, 89 Minn. 132, 136, 94 N. W. 436, 438).

In Choctaw O. & G. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96, it was said "the true test is not in the exercise of care to discover dangers, but whether the defect is known [to] or plainly observable by the employee." The plaintiff is not required to look for danger, but is held to assume the risks—only when the danger is so apparent that one who owes no duty to inspect was bound to discover it, but that is ordinarily a question of fact for the jury. As to appreciation of risk, as distinguished from knowledge of danger, the question is: Did the servant understand the risk, or by the exercise of ordinary observation ought he to have understood the risk, to which he was exposed by the dangerous situation? Mitchell, J., in Scharenbroich v. St. Cloud Fiber-Ware Co., 59 Minn. 116, 121, 60 N. W. 1093.

Most, if not all, of the opposed decisions, which have adopted indifferently either or both this standard and the exercise of reasonable care, are to be differentiated, because they were rendered when and where the distinction between contributory negligence and assumption of risk was ignored. Indeed, the misuse of ordinary care in this direction has usually been the result of inadvertence and has often been the sequence to mere casual inaccuracy in language. The test has rarely, if ever, been the result of deliberate consideration of principle or precedents. As Mr. Justice White pointed out in Texas & P. Ry. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 779, 42 L. Ed. 1188, "no reason can be found for and no authority exists supporting the contention." It would be a work of supererogation to add to the authorities there cited. They exist, however, in large numbers.

It is evident that there are objections to the adoption of this criterion. The traditional variations in the size of the chancellor's foot are no more uncertain. Yet the question is universally regarded as one

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resting, not in the sound discretion of the court, but in positive law, unless it should be in the sense that the law should not be too exacting on one situated as the servant is. Earl, J., in Hawley v. Northern, 82 N. Y. 370. The decision must depend largely upon the circumstances of each case and with due reference to the familiar rule that the jury must determine where reasonable minds would draw different conclusions as to what the facts are and as to what inferences should be drawn from them.

In the fifth place, the gist of the controversy arises when courts are asked to give a peremptory charge to the jury. When are the questions of fact, and when of law? It will conduce to avoidance of current confusion to consider the multitude of cases on this subject in this order: First, the English cases; second, the American cases generally; and, third, the previous decisions of this court.

First. In Thomas v. Quartermaine, 18 Q. B. Div. 685 (1887), plaintiff brought action under the employer's liability act for injuries received by falling into a cooling vat which was not fenced in. It was held by a divided court that the defense arising from the maxim, volenti non fit injuria, had not been affected by the employer's liability act and that therefore plaintiff was not entitled to recover. The pronounced difference of opinion between the judges who decided this case became the basis of much controversy. While the American cases have rarely observed the pronounced hostility to it on the part of the English judges, its career in its own country has been a stormy one. In Baddeley v. Granville, 56 L. J. (N. S.) 501 (1887), it was regarded as holding that the maxim did not apply at all to breaches of statutory obligation. In Thrussell v. Handyside, L. R. 20 Q. B. Div. 359 (1888), it was held that the servant working with knowledge of the danger and of the risk could recover for injuries inflicted by the servant of an independent contractor, which differentiates it from Thomas v. Quartermaine supra, notwithstanding the maxim. In Yarmouth v. France, 19 Q. B. Div. 647 (1887), it was pointed out that the Quartermaine case was decided upon imperfect argument (see page 654), and that its holding in effect was that "mere knowledge of the danger will not do. There must be an assent on the part of the workman to accept the risk, with full appreciation of its extent, to bring the workman within the maxim 'Volenti non fit injuria.' If so, that is a question of fact."

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Lord Esher, at page 657. Lindley, L. J., said at page 659: "The question whether in any particular case [the conduct of the servant] was [volenti et scienti] is a question of fact and not of law. * * * The mere fact that the plaintiff knew of the danger and yet incurred it is not conclusive. * * * The question in each case must be, not simply whether the plaintiff knew the risk, but whether circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff. * * * The doctrine does not apply when what the servant does is induced by fear of dismissal." The opposed view of Lord Bramwell was "that where a man is not physically constrained, and where he can at his option do a thing or not, the maxim * * * applies." Membery v. Great Western, 14 App. Cas. 179. According to Mr. Labatt, whose opinions on this subject are entitled to peculiar consideration (1 Labatt, Master & Servant, § 62), Lord Bramwell was "one of the straightest of the sect of those economic Pharisees whose Gamaliels were such writers as Ricardo and John Stuart Mill. It is not too much to say that the opinion delivered by him in Dynen v. Leach (1857) N. L. J. Exch. (N. S.) 221, has contributed more largely than any other judicial utterance to establish the principle of assumption of risks, in the rigorous and unmerciful form in which we now have it."

It is clear that the English courts do not accept Lord Bramwell's views. In Smith v. Baker, 1891 App. Cas. 325, plaintiff was employed by a railroad contractor to drill holes in a rock cutting near a crane worked by men in a different department and over which he had no control. The crane lifted stones and at times swung them over the plaintiff's head without warning. The plaintiff was fully aware of the danger to which he was exposed by thus working near the crane without any warning being given, and had been thus employed for months. Complaint to the master had been made. A stone fell from the crane and injured him. It was held that the action was maintainable, and that the master's systematic neglect to give warning did not preclude him from recovery. The general rule laid down is: "The mere fact that a servant undertakes or continues [in a dangerous] employment with full knowledge and understanding of the danger is not conclusive to show that he has undertaken the risk so as to make the maxim * * * applicable in case of injury. The question * * * is one

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of fact, and not of law; and this is so both at common law and * * * under the employer's liability act." Emphasis was laid upon the fact that the maxim was not scienti, but volenti. It is significant that Lord Bramwell held that plaintiff assumed the risk as a matter of law. In Williams v. Birmingham (1899) 2 Q. B. 338, while a workman, in the course of his employment, was descending from an elevated tramway belonging to his employers, his foot slipped and he fell to the ground, receiving injuries which caused his death. The employers had provided no ladder or other safe means of ascending to or descending from the tramway. The jury found that it was dangerous to descend from the tramway without a ladder, that the deceased had the same means of knowing that it was dangerous as the attendants had, and that he did know that it was dangerous. None the less it was held that, in the absence of a finding by the jury that the deceased had agreed to undertake the risk of descending from the tramway without a ladder or other safe means of descent, the plaintiff was entitled to judgment upon the findings of the jury. Romer, L. J., thus summarizes the liability at common law of an employer of labor: "If the employment is of a dangerous nature, a duty lies on the employer to use all reasonable precautions for the protection of the servant. If, by reason of a breach of that duty, a servant suffers injury, the employer is prima facie liable, and it is no sufficient answer to the prima facie liability for the employer to show merely that the servant was aware of the risk and of the nonexistence of the precautions which should have been taken by the employer, and which, if taken, would or might have prevented the injury. In order to escape liability, the employer must establish that the servant has taken upon himself the risk without the precautions. Whether the servant has taken that upon himself is a question of fact to be decided on the circumstances of each case. In considering such a question the circumstance that the servant has entered into or continued in his employment, with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive against him." Page 345. It is to be noted that in this case no proper appliances had ever been provided, and this negligence was the cause of the accident. Compare Griffiths v. London, 12 Q. B. D. 493, 13 Q. B. D. 259. To conclude, in England, "it would seem, however, that there is now a clear tendency

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on the part of the courts to treat the question of what inference is to be drawn from the fact of the plaintiff's knowledge of the danger as always one of fact for the jury. * * * At any rate, the mere fact of a servant continuing to work, with knowledge of the danger and appreciation of the risks, will not necessarily raise the inference that he was volens to take the risk." 17 Jurid. Rev. 45, 46. The best American review of the English authorities will be found in Mr. Labatt's note to 47 L. R. A., at page 161. And see Kager v. Vickery, 61 Kan. 342, 59 Pac. 628, 49 L. R. A. 161, 78 Am. St. 318.

Second. In America the confusion of authorities has been aggravated and not diminished by the change in English theory. The English rule has received judicial and academical sanction. Marks v. Cotton, 138 N. C. 401, 50 S. E. 769, 3 Am. & Eng. An. Cas. 812–814; Lloyd v. Hanes, 126 N. C. 359, 35 S. E. 611. In 20 Harvard L. Rev., Mr. Frances H. Bohlen, discussing the liability of the master under the statute says (page 22): The servant must have encountered and known the danger "under such circumstances as to indicate that he voluntarily, willingly, and affirmatively assumed the risk; that he recognized the danger, knew his right to be protected from it, but still chose to encounter it, not because of the pressure or coercion put upon him by the defendant's wrongdoing, but for some private reason of his own." More frequently the English rule has been considered and given weight without such formal adoption as to render the result entirely inconsistent with the former general opinion. Choctaw v. Jones, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837; Atlas v. National Biscuit Co., 100 Minn. 30, 110 N. W. 250; Dempsey v. Sawyer, 95 Me. 295, 49 Atl. 1035, at page 1038. In Mahoney v. Dore, 155 Mass. 513, 30 N. E. 366, the English rule was apparently adopted; in O'Maley v. South, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161, which has been regarded as "of little practical effect" (8 Harvard L. Rev. 469), it was apparently rejected (47 L. R. A. 161; 1 Labatt. Master & Servant 376).

The English cases, taken as a whole, have tended directly, naturally, and logically to induce American courts to place emphasis, inter alia, upon the rules that the maxim is not "scienti," but "volenti," that in close cases the questions are for the jury, and that assumption of risk

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is not presumed; the burden of proof being upon the defendant to show assumption in fact, or such facts as lead to its natural inference. It is to be noted in this connection, however, that there is earlier authority as to this burden of proof. Blankavag v. Badger, 136 Wis. 380, 117 N. W. 852; Nadau v. White River, 76 Wis. 120–131, 43 N. W. 1135, 20 Am. St. 29; Swoboda v. Ward, 40 Mich. 420–424. But compare Dallemand v. Saalfeldt, 175 Ill. 310, 51 N. E. 645–647, with Chicago v. Heerey, 203 Ill. 492, 68 N. E. 75.

The statement is currently made that the American cases taken as a whole are inclined to regard the questions involved in assumption of risk—knowledge of dangerous conditions, appreciation of risk, and acquiescence therein—as for the jury. In connection with this opinion many hundreds of cases have been examined and that tendency verified. It is conspicuous in the great number of distinctions drawn by courts, some shadowy, some substantial, in the apparent effort to approximate what they have regarded as substantial justice without abolishing the rule. None the less the tendency has often varied. Consistencies are innumerable. To enumerate or discuss the vast multitude of relevant precedents is out of the question.

A few of many illustrations will be referred to. In general, see Mahoney v. Dore, 155 Mass. 513, 30 N. E. 366 (per Knowlton, J.); Dempsey v. Sawyer, 95 Me. 295, 49 Atl. 1035; Fitzgerald v. Connecticut, 155 Mass. 155, 29 N. E. 464, 31 Am. St. 544; Choctaw, O. & G. R. v. McDade, supra. The tendency is clear in many cases which have considered facts more or less similar to these in the case at bar. In Washington & G. R. Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235, plaintiff was injured while pulling a belt on a pulley by hand. He had for eighteen months performed the same duties as when injured. After stating the current formula as to contributory negligence and assumption of risk, Lamar, J., said, quoting from Jones v. East Tennessee, V. & G. R. Co., 128 U. S. 443, 9 Sup. Ct. 118, 32 L. R. A. 478: "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others." And see Miller v. Kimberly, 137 Wis. 138, 118 N. W. 536; Cox v. Capital, 47 Wash. 148, 91 Pac. 555 (employee working on a rip saw injured by hand coming into con-

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tact); Louisville v. Wilson, 124 Ky. 836, 99 S. W. 634, 30 Ky. L. R. 734 (revolving machinery which plaintiff did not know could have been guarded); Heffernan v. Fall River, 197 Mass. 28, 83 N. E. 5 (cleaning machinery); Little v. Bousfield (Mich.) 117 N. W. 903 (servant's clothing caught in revolving set screw while replacing pulley belt); Chopin v. Combined, 134 Wis. 35, 114 N. W. 95 (similiter); Kalker v. Hedden, 72 N. J. L. 239, 61 Atl. 395 (defective keys used to fasten a pulley to a revolving shaft, which caught in the edge of the belt).

In Busch v. Robinson, 46 Ore. 539, 81 Pac. 237, as in the case at bar, plaintiff slipped and fell, and was injured by being caught in machinery. In that case a board on a platform on which she was compelled to stand had been negligently allowed to become defective. It was held that the question of assumption of risk was for the jury. And see Mundhenke v. Oregon, 47 Ore. 127, 81 Pac. 977, 1 L. R. A. (N. S.) 278; Meade v. Ashland, 125 Ky. 114, 100 S. W. 821 (in which plaintiff on several occasions had nearly fallen into the cogs). See also Cristanelli v. Saginaw, 117 N. W. (Mich.) 910. A different element is introduced when the floor on which the plaintiff slipped is to his knowledge wet and slippery. Ordinarily the risk then is assumed. Kleinest v. Kunhardt, 160 Mass. 230, 35 N. E. 458; Feely v. Pearson, 161 Mass. 426, 37 N. E. 368; Scharenbroich v. St. Cloud, Fiber-Ware Co., 59 Minn. 116, 60 N. W. 1093.

Third. The decisions of this court involve the complexity and confusion and inconsistency of opinion on the subject which are to be found everywhere. The rule that both contributory negligence and assumption of risk may be utilized as defenses by a defendant sought to be charged with negligence because of violation of a statutory duty to safeguard dangerous appliances was early adopted and has been consistently followed. Anderson v. C. N. Nelson L. Co., 67 Minn. 79, 69 N. W. 630; Hermann v. Clark, 89 Minn. 132, 94 N. W. 436; Swenson v. Osgood & Blodgett Mnfg. Co., 91 Minn. 509, 98 N. W. 645; McGinty v. Waterman, 93 Minn. 242, 101 N. W. 300; Schutt v. Adair, 99 Minn. 7, 108 N. W. 811. Inevitably, however, uncertainty has arisen in applying the rule. Such cases constitute a class by themselves. See De Greif v. Northwestern Knitting Co., 106 Minn. 15, 118

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N. W. 558. The distinction between knowledge of danger and appreciation of risk has been repeatedly recognized and affirmed.

The leading opinion on the subject in this jurisdiction, which has been followed times without number by other courts, and the one most nearly controlling the present controversy, is that of Mitchell, J., in Wuotilla v. Duluth L. Co., 37 Minn. 153, 33 N. W. 551, 5 Am. St. 832. There plaintiff's clothing was caught while he was going past gearing where two wheels "mashed," whereby he was injured. He knew the gearing was uncovered. The question of appreciation of risk was submitted to the jury. Among other decisions, Gray v. Commutator Co., 85 Minn. 463, 89 N. W. 322, Lund v. Woodworth & Co., 75 Minn. 501, 78 N. W. 81, Christianson v. Northwestern Compo-Board Co., 83 Minn. 25, 28, 85 N. W. 826, 85 Am. St. 440, Hendrickson v. Ash, 99 Minn. 417, 109 N. W. 830, Atlas v. National Biscuit Co., 100 Minn. 30, 110 N. W. 250, Samuelson v. Hennepin Paper Co., 101 Minn. 443, 112 N. W. 537, Lee v. Wild Rice L. Co., 102 Minn. 74, 112 N. W. 887, and Seely v. Tennant, 104 Minn. 354, 116 N. W. 648, also tend to require the submission to the jury of plaintiff's assumption of risk.

The authorities upon which the trial court relied tend, on the contrary, to sustain his conclusion that the plaintiff should not recover. Hermann v. Clark, 89 Minn. 132, 94 N. W. 436; Anderson v. C. N. Nelson Lumber Co., 67 Minn. 79, 69 N. W. 630; Swenson v. Osgood & Blodgett Mnfg. Co., 91 Minn. 509, 98 N. W. 645; McGinty v. Waterman, 93 Minn. 242, 101 N. W. 300; Schutt v. Adair, 99 Minn. 7, 108 N. W. 811. It is apparent, however, that the tendency in this court conforms to the general opinion, viz., that it is proper to send to the jury close questions as to which reasonable minds might reach different conclusions. See De Greif v. Northwestern Knitting Co., supra; Borchardt v. People's Ice Co., 106 Minn. 134, 118 N. W. 359.

Finally, in the view of the law as it thus appears and in view of the facts of this particular case, we are of the opinion that the trial court was in error in holding plaintiff was precluded from recovery because of assumption of risk. There was no controversy as to any constraint upon his conduct. So far as the court held that plaintiff was as a matter of law volens to the risk, it may be conceded that no error appears. There was no direct testimony as to plaintiff's express knowledge of the danger or appreciation of the risk. The question then resolves

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itself into whether or not the danger and the risk were so apparent that knowledge and appreciation should have been attributed to him as a matter of law.

Plaintiff, while engaged in shoveling coal, was in charge of an engine. He had some opportunity to observe that the belt and pulley were unguarded. His work was, however, done at night. The record is not ample as to how often he had opportunity to observe, nor as to the brightness of the light. On the present record we are somewhat in doubt whether plaintiff could have been held to a knowledge of the condition as a matter of law. However this may be, it is clear that his appreciation of the risk was for the jury. He had no special occasion to animadvert to the possible danger. He had done his usual work with safety under the same conditions. No peril necessarily confronted him. Was he bound to reason that if something should cause him to fall, and that if he should fall in the direction of the shaft, and that if it should at the time be in motion, he might be hurt? So far as assumption of risk was concerned, he was bound by what would have been revealed by ordinary observation, not by exercise of reasonable care. We think that it was error to hold him to have assumed the risk as a matter of law, because, as Ryan, J., said, in Dorsey v. Phillips, 42 Wis. 583, "the consequence of acquiescence must rest upon positive knowledge * * * of the precise danger assumed, and not on vague surmise of the possibility of danger."

3. It follows, from the reasoning as to assumption of risk, that the question of plaintiff's contributory negligence was for the jury. It is obviously inconsistent for defendant to urge that no actionable negligence appeared on the master's part in failing to anticipate possible injury, but that it was negligence for the servant not to have appreciated the danger. Inter alia, Swick v. Ætna, 147 Mich. 454, 111 N. W. 110, is apt. There a hand wrench slipped, and plaintiff, who was using it, slipped, whereby he fell into an unguarded pulley and was injured. It was held the defense of contributory negligence was for the jury.

Reversed.

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ALICE M. WEBB v. MINNEAPOLIS STREET RAILWAY COMPANY.[1]

March 5, 1909.

Nos. 15,931—(159).

Expert Evidence Must Be Based on Facts.

The plaintiff had a verdict for $4,250 in this a personal injury action. *Held*, questions calling for the opinion of an expert witness must be based upon facts testified to by him, or facts testified to by others, or an agreed state of facts, or facts assumed hypothetically as true.

Verdict Excessive.

Award of damages was excessive.

Action in the district court for Hennepin county to recover $10,000, damages for personal injuries. The case was tried before Dickinson, J., and a jury which returned a verdict in favor of plaintiff for the sum of $4,250. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Reversed and new trial granted.

N. M. Thygeson and *W. H. Bennett*, for appellant.

McElwee & Hollihan, *M. H. Boutelle* and *A. M. Higgins*, for respondent.

START, C. J.

Appeal from an order of the district court of the county of Hennepin denying the defendant's motion in the alternative for judgment notwithstanding the verdict or for a new trial in an action in which the plaintiff recovered a verdict for $4,250 on account of injuries claimed to have been sustained by reason of the alleged negligence of the defendant.

The allegations of the complaint as to the negligence were to the effect following: That on the fourteenth day of November, 1907, the plaintiff, with a companion, attempted to board one of defendant's Oak and Harriet cars, the car having been stopped and the gates opened for the purpose of permitting plaintiff and her companion to go upon the car and become passengers thereon; that plaintiff's companion

[1] Reported in 119 N. W. 955.

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passed through the gates and up the steps ahead of the plaintiff; that as plaintiff was in the act of passing through the gates, and about to pass up the steps, the car was suddenly started, the gates closed against and upon her limbs and body, and she was thrown with great force upon and against the steps, her limbs were held fast in the gates, and she was dragged along for an entire block, the car meanwhile running at a high rate of speed; and, further, that by reason of her fall, and being so dragged along, one of her ribs was fractured or dislocated, that she was bruised upon and across her abdomen and left groin, and her lower limbs and feet were bruised, that she was, at the time of receiving such injuries, nearly two months advanced in pregnancy, and she miscarried by reason of such injuries.

The answer admitted that the plaintiff boarded the car to become a passenger thereon, put in issue the allegations of negligence and consequent injury, and alleged contributory negligence on the part of the plaintiff, and that before the time she boarded the car she was and had been for a number of years a neurasthenic. While the order appealed from is one denying the defendant's motion in the alternative for judgment or a new trial, the defendant in its brief properly treats the order simply as one denying its motion for a new trial, which was in fact the motion made in the court below.

The plaintiff testified to the effect that at the time stated in her complaint she attempted to board the car, and in so doing placed her right foot on the step, when the car started, and she was caught in the gates; that her left leg was caught and fastened from the hip down, her foot being outside the gates; that she called several times to her companion who preceded her into the car, but no one came to her assistance, and she was carried in such position to the next block, when the car stopped and the gates were opened to let a passenger off, and she fell in on the steps, striking on her left side. During the time she was fastened in the gates she kept hollering for her companion, who did not hear, and so far as appears from the record none of the numerous passengers in the car heard any outcry from her.

The first contention of the defendant is that the plaintiff's story as to the manner of the accident is so inherently improbable as to bring this case within the rule stated in the case of Messenger v. St. Paul City Ry. Co., 77 Minn. 34, 79 N. W. 583. It seems quite unreasonable

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that the plaintiff was caught, held, and carried precisely as she testified, especially in view of the testimony of the motorman and others. Nevertheless the main question was whether she was caught in the gates and injured by reason of the negligence of the motorman and conductor in charge of the car, or either of them. The evidence is sufficient to sustain a finding to the effect that she was caught in the gates of the car at the time claimed. The evidence on the part of the defendant and the acts of its claim agents corroborate in some material particulars the claim of the plaintiff that she was caught in the gates in some manner and thereby injured to some extent.

It is further urged by the defendant that the award of damages is so excessive that it is entitled to a new trial. If the plaintiff had been sound physically at the time of the accident, and her subsequent physical condition was due solely to injuries received at that time, the damages awarded would be liberal, but not so excessive as to justify a reversal of the order denying a new trial. The manifest weight of the evidence is to the effect that she was not in sound health at the time of the accident. The most serious result of her injury, accepting her testimony as true, was a miscarriage, and that by reason thereof she suffered mental and physical pain and her health was impaired. But it is admitted that she had at least one miscarriage before the accident. There was evidence, which she denied, tending to show that she had one other miscarriage. The evidence also tended to show that she was not properly cared for at the time of the admitted miscarriage. The evidence is practically undisputed that the physical condition of the plaintiff prior to the accident was a factor of her condition at the time of the trial. The trial court correctly instructed the jury that the defendant could not be held to answer for any damages by reason of conditions or troubles of a physical character that existed prior to the accident. The amount of the damages awarded clearly indicates that the jury from passion or prejudice disregarded the instruction. We are of the opinion, upon a consideration of the entire evidence, that the verdict is so excessive that a new trial must be granted.

The admission of incompetent opinion evidence also may have affected the award of damages. The plaintiff's physician was asked the question: "Q. In the absence of the operation, which you say will be necessary, is Mrs. Webb's condition permanent or otherwise—her

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condition of injury?" The question was objected to because it called for an opinion without disclosing or referring to the facts upon which it was to be based. The objection was overruled, and the witness answered, to the effect that her condition was permanent. The ruling was error, for the rule is that questions calling for the opinion of an expert witness must be based upon facts previously testified to by him, or facts testified to by others, or upon an agreed state of facts, or facts assumed hypothetically as true. The reasons for the rule are obvious; for, if the facts upon which the opinion is based are not stated or definitely referred to in the question, the jury cannot measure the value of the opinion, and the opposite party cannot intelligently offer opinion evidence in rebuttal. On the other hand, if the assumed facts upon which the opinion is to be based are stated or referred to in the question, the jury may determine whether or not the facts exist, and measure the value of the opinion accordingly, and the adversary party may rebut the assumed facts, or challenge the correctness of the opinion based thereon.

Order reversed and a new trial granted.

WILLIAM JOHNSON v. GREAT NORTHERN RAILWAY COMPANY.[1]

March 5, 1909.

Nos. 15,955—(222).

Damages for Injury to Nervous System.

When damages are sought to be recovered for injuries to the nervous system, alleged to have been caused by actionable negligence, the utmost circumspection must be exercised to avoid the injustice which is likely to result from the denial of substantial compensation for real injuries and in the award of damage in cases of honest mistake or of cunning fraud.

Same—Value of Expert Testimony.

The value to be attached to the testimony of physicians concerning alleged nervous disorders is to be determined, inter alia, by the extent and character of the examination actually made by the testifying physicians,

[1] Reported in 119 N. W. 1061.

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generally as to plaintiff's physiological condition, and especially as to the condition of his nervous system.

Verdict Excessive—New Trial.

A new trial is here granted because a verdict of $4,060 is *held* to have been excessive for an injury which the testimony showed consisted of some soreness or lameness of the back and of some possible, but conjectural, nervous or similar trouble, not reasonably shown to have been caused by the accident.

Action in the district court for Anoka county to recover $10,100, damages for personal injury. The case was tried before Giddings, J., and a jury which rendered a verdict in favor of plaintiff for the sum of $4,060. From an order denying defendant's motion to set aside the verdict and for a new trial, it appealed. Reversed and new trial granted.

Brown, Albert & Guesmer, for appellant.

McElwee & Hollihan and *John P. Coleman,* for respondent.

JAGGARD, J.

Plaintiff and respondent, a stock buyer, had a stock car placed on the defendant-appellant's industry track for his use. According to the defendant's witness, plaintiff had gone to the defendant's agent and procured his shipping receipt. Thereupon the car was put on the switching list, according to a custom of which the plaintiff must have known. This was before the accident. According to the defendant, it would seem that he procured the receipt before the accident. At all events the engine of the local freight shunted two cars between it and the plaintiff's car. At this time the gang plank of the cattle chute was in position for loading; one end in the chute, and the other in the car. The force of the shunted car tore down the stock chute, and tore off one of the posts, and moved the plaintiff's stock car about half a car length. Plaintiff was thrown to the ground, and in falling struck his back and left side. The jury awarded him a verdict of $4,060. This appeal was taken from the order of the trial court denying defendant's motion for a new trial.

Defendant's argument is "that a new trial should have been granted: (1) because the evidence does not support a finding of liability; (2) because under the evidence the amount of the verdict was excessive and was given through passion and prejudice, and (3) on account of

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errors occurring at the trial and excepted to." It was urged on oral argument that plaintiff was precluded from recovery by his contributory negligence. The point was not made in defendant's brief. It is therefore not before us for consideration.

The question whether plaintiff sufficiently bore the burden of showing actionable negligence on defendant's part is presented; but, upon the record, we have concluded that judgment for defendant notwithstanding the verdict should not be directed.

The gist of the present controversy is the size of the verdict. The alleged injury consisted of a lameness of the back and of resulting nervous trouble. That subtle nervous disorders may exist, and that, as our civilization produces less hardy and more highly organized individuals, they tend to occur more frequently, and to result more seriously, is obviously true. It is equally familiar that even the more highly trained specialists cannot readily distinguish some forms of actual nervous derangement from analogous physiological conditions which may have been falsely described through ignorance, or which may have resulted from conscious malingering. A fortiori, in such cases, the testimony of even a reputable practitioner is to be weighed with especial care. The difficulty is, of course, greater where the condition occurs without a lesion—i. e., in cases of traumatic neurosis or traumatic neurasthenia—than where external force has produced a morbid change in the functions or texture of the tissues or organs. Well-considered decisions have gone so far as to hold that no considerable verdict will be allowed to stand upon proof of subjective symptoms only, not only because the existence and extent of such subjective condition depends upon the veracity of the patient, affected as he must be, interested in the outcome of the litigation, but also because of the frequent miracles of recovery after application of "a greenback plaster." None the less the abnormal conditions may be real and result seriously. Much testimony must be admitted, as a matter of course, which is subject to the same objection as to interest. Many verdicts are of unquestionable validity which are subject to the same criticism of their probable substantial injustice. It is clear that wrong is likely to result from denial of substantial damages for real injury, and also from their award in cases of honest mistake or cunning fraud.

It is certain that, where nervous derangement due to an accident is

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alleged, courts are called upon to exercise the utmost circumspection. They would pervert their functions if they undertook to prescribe how physicians should proceed, or to dogmatically determine what significance should be attached to the results of their examination. The law, which is fixed, is not authority on physiological science, which is progressive. Judges are not physicians. The courts, as Lord Bowne pointed out, are not the proper places for conducting experiments in inductive science. Indeed, the primary purpose, to subserve which expert evidence on the immediate subject is received, is to advise courts of the results of such questions asked of nature and the conclusions of scientific men prevailing at the time of the trial. Accordingly as opinions of physicians change, the legal effect of facts testified to must also change.

A few elementary principles of diagnostic neurology are now so generally recognized by scientific authority that they should ordinarily be applied. The examination of the patient should be systematic and thorough, and extend to the anatomy of the individual to the extent circumstances demand, to the physiological conditions generally of his person, more specifically his organs likely to be affected, and especially of his deeper and superficial reflexes. The authorities insist that by such an examination, an expert, qualified by learning and experience, is able to determine the true condition of the person examined beyond his power of successful simulation or misrepresentation, and to expose the ignorance, mistake, or fraud of opposing experts. There may be cases so clear that conformity with so exhaustive tests may not be necessary, but doubtful instances must be scrutinized with all known care and tried by all available means.

The record is to be considered in the light of these considerations. Plaintiff called two physicians. Both found a lameness or tenderness of the back. In this they were corroborated by plaintiff's and by defendant's witnesses. This element of damages stands practically undisputed. It would clearly, however, not be sufficient to sustain a verdict to the amount here awarded to plaintiff. The verdict must stand or fall according to the testimony pertaining to the nervous disturbance and its sequences. Neither of plaintiff's two experts appear in the record to have had the necessary knowledge and experience of a specialist in nervous diseases. Indeed, one of them frankly admits

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that he did not "claim to be an expert on nervous conditions," and was called as a general practitioner, who as such had attended the plaintiff. Neither testified to have made an adequate examination upon which to rest the conclusions of any serious nervous trouble. The diagnosis of neither purported to be based upon investigation into the normality of plaintiff's physical condition generally, or of his organs or of his deeper or superficial reflexes. The examination was not systematic. Indeed, it was extremely limited and cursory. It amounted at most to a partial investigation into the loss of sensation in the legs. The most significant item was that at places "the hair has turned white." It was frankly admitted, however, that this could not have been connected with the accident.

The two physicians called by the defendant testified that they had made thorough and scientific examination of plaintiff's person. They examined "his eyes, his feet, and his legs, * * * his lungs, heart, abdomen, his back, his nervous sensation, or knee jerks, and in fact everything connected with a general examination." The urine on analysis was found normal. The record itself demonstrates the competency of these physicians as experts. They concluded that the plaintiff was not and had not been suffering from "any trouble with his nervous system, or with his spinal column"; that they "could find nothing the matter with him as a result of the injury he had received" except tenderness and soreness in the muscles of the back, from which his recovery would be comparatively quick. It is evident that the expert testimony necessitates the belief that plaintiff was not seriously injured.

It remains to examine plaintiff's testimony and his conduct. That testimony must be considered, not so much in the light of the plaintiff's interest in the outcome of the litigation, which is naturally for a jury to weigh, as of plaintiff's inevitable lack of technical knowledge necessary to the correct estimate of his physical condition and of the cause of any deviation from the normal. His own evidence, on direct and on cross examination, taken as a whole, does not produce any strong impression that he was much hurt, except in his back, or that the troubles of which he complained could reasonably be traced to the accident. This view of his injury is strengthened by his own and other testimony as to his active conduct of his affairs after the acci-

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dent. The natural inference is that he transacted his business much the same after as before the accident. One wholly disinterested and unimpeached witness, for example, testified that he had seen plaintiff at least once or twice a month since the accident coming in with his shipments, in and around the yard, in the cars, getting on and off, just as he had always been doing. It is significant that, when the accident occurred, plaintiff went on with his work and complained of being hurt to no one at the time, and that his silence on the subject lasted until several months afterwards.

Under the circumstances, it is clear that it is impossible to sustain the verdict of over $4,000 for the injury that has actually been shown. In Goss v. Goss, 102 Minn. 346, at page 348, 113 N. W. 690, at page 691, Chief Justice Start said: "The rule is now too well settled to be seriously questioned that the trial court may, in actions of tort, as well as in actions on contract, in the exercise of a sound judicial discretion, when it deems a verdict excessive and the result of passion and prejudice on the part of the jury, deny a new trial on condition that the prevailing party remit such sum as shall leave the recovery not excessive in the judgment of the court. When, however, the damages are so excessive, and the circumstances as disclosed by the evidence as to other issues are such, as to indicate a fair probability that the jury were influenced by passion or prejudice in the determination of the other issues, a new trial should be granted. Whether in any given case a new trial should be granted or denied on condition that the verdict be reduced rests largely in the sound judicial discretion of the trial court."

The real question in this case is whether the damages should be reduced or a new trial granted. We are of the opinion that the verdict was so excessive that the only proper course to pursue is to grant a new trial.

Reversed and new trial granted.

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ALLEN FRYE and Another v. HUGH L. WAKEFIELD and Others.[1]

March 5, 1909.

Nos. 15,970—(220).

Commission for Sale of Real Estate.

In an action to recover commissions alleged to have been earned by the production of a purchaser for certain real estate, it appeared that the owner gave the proposed purchaser an option to purchase the land if the holder of a prior existing option failed to avail himself of his privilege to purchase. The sale was made to a party not named in the first option, but who claimed an interest therein and the right to purchase under it. *Held*, that the finding of the jury that the party to whom the sale was made was not entitled to purchase under the option is not sustained by the evidence.

Action in the district court for Hennepin county to recover $5,872, commission for producing a purchaser for certain lands. The lands were owned jointly by the defendants, Hugh L. Wakefield, Ferdinand Leutz, John D. Gray, Edward T. Jones, E. W. Brown and Maurice D. Sanger, but the title stood in the name of defendant Wakefield. One Frank A. Little gave O. J. Hawkinson an option on the land, and subsequently plaintiffs, with whom the lands had been listed by defendant Sanger, found William G. Hyslop who was given an option to buy the land in case Hawkinson failed to take it. Plaintiffs were to have a commission of one dollar per acre out of which Sanger was to receive thirty cents per acre. Defendants, except Sanger, who answered separately, denied that the lands had been listed with plaintiffs. Hawkinson failed to avail himself of his option; Hyslop ~~at once~~ offered $5 per acre and the lands were sold to Little at $4.50. Plaintiffs demanded one dollar per acre for securing the purchaser Hyslop.

The case was tried before Holt, J., and a jury which returned a verdict in favor of plaintiffs for the amount asked, less thirty per cent. which by agreement was to be paid to Sanger. From an order denying the motion of defendants, except Sanger, for a new trial or judgment notwithstanding the verdict, defendants, except Sanger, appealed. Reversed and new trial granted.

[1] Reported in 120 N. W. 35.

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C. A. Bucknam, Harris Richardson and *Harold C. Kerr,* for appellants.

William H. Hallam and *Wickham & Farr,* for respondents.

ELLIOTT, J.

In an action to recover commissions alleged to have been earned under a contract to furnish a purchaser for certain real estate, the plaintiffs recovered a verdict, and certain of the defendants appealed from an order denying their motion for judgment notwithstanding the verdict or for a new trial. Upon this appeal numerous errors are assigned; but we find it unnecessary to consider many of the questions which have been discussed, as we are satisfied that a new trial must be granted because of the insufficiency of the evidence to sustain one of the allegations essential to the plaintiffs' recovery.

In 1902 the defendants purchased certain wild lands, and for purposes of convenience in making sales the title thereto was taken in the name of Wakefield, one of their number. The parties had definite interests in the lands in proportion to the amount of money advanced by each towards the purchase price. After the title had been vested in Wakefield it was agreed among the associates that the lands, when sold, must net them four dollars per acre, and that any one of the owners who succeeded in finding a purchaser at a higher price might retain the excess as his commission. Wakefield was engaged in other business, and appointed Nichols to represent him in his absence in all matters connected with sales of the lands. About August 10, 1907, Wakefield listed certain of the lands with Little at a net price of $4.50 per acre, and Little set out to find a purchaser at a price which would give him a profit.

Negotiations with various parties, including Frye and Gillies, the respondents herein, resulted in an agreement by a party named Hawkinson to purchase the land in question at six dollars per acre. By this time several parties had become interested, each of whom was maneuvering for a share of the profits. When Hawkinson agreed with Little to take an option to purchase the land at six dollars per acre, he drew his check for $1,000, payable to Little, and handed it to him as earnest money. Hawkinson knew that the title of the land was in Wakefield, but apparently knew nothing of the price which Wakefield

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had made to Little. Little indorsed the check and sent it to Nichols, who was representing Wakefield. Hawkinson had arranged that the contract should express a consideration of seven dollars per acre, and, this becoming known to parties whom he expected to go into the transaction with him, they refused to proceed, and Hawkinson stopped payment on the $1,000 check. Little then went to Osseo, Wisconsin, where Hawkinson resided, and met Hawkinson, Frye, and other parties interested in the deal. Some arrangement was there made which resulted in the payment of the check. Little then returned to Minneapolis, where he saw Nichols and closed the transaction by the execution of a written contract which gave Hawkinson the right to purchase the land at any time prior to and including October 1, 1907. Nichols desired that this option contract should run to Little, instead of Hawkinson; but at Little's instance it was made out in the name of Hawkinson.

Before the expiration of this option Frye and Gillies, who were doing business under the name of the Western Land Company, found a party by the name of Hyslop who was willing to purchase the land, and further negotiations with Nichols resulted in the giving by Nichols to Hyslop of an option which entitled him to purchase the land if the Hawkinson option was not consummated. All parties understood that Hyslop's option was junior and subordinate to that of Hawkinson. At this time Nichols understood that the so-called Hawkinson option was for the benefit of Little, Hawkinson, and their associates, and when Little appeared on the last day with the money a contract was executed to him for the purchase of the land. On the following day Hyslop appeared, and was informed that the lands had been sold to Little under the Hawkinson option. Frye and Gillies then claimed a commission, on the theory that they had produced Hawkinson as the purchaser, and were referred by Nichols and Wakefield to Little.

The outcome of the complicated transaction was this action to recover a commission alleged to have been earned by the production of Hyslop as a purchaser under an express contract claimed to have been made by Sanger, one of the parties who owned the land, on behalf of the owners. The trial court instructed the jury to find whether the owners of this land had formed a partnership for the purpose of its sale, and that the plaintiffs could not recover if the land had been sold

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to Little in pursuance of the original option, which stood in the name of Hawkinson. The jury found that Little had no interest in that option which entitled him to purchase under it.

This finding was so against the weight of the evidence that the trial court should have set aside the verdict and awarded a new trial. Early in August, 1907, Wakefield offered to sell the land to Little for $4.50 per acre, and with this understanding Little authorized one Swickard to sell it for five dollars per acre. Little was not then an agent for Wakefield. Swickard met Frye and one McKenney in North Dakota, where the land was situated, and offered the land to them for $5.50 per acre. Hawkinson had gone to Dakota with Frye for the purpose of examining lands, and as a result of the consultation between Little and Hawkinson the latter agreed to purchase the land at six dollars per acre, the contract to state the purchase price at seven dollars per acre, to enable him to unload it upon his associates at an advance of one dollar per acre. Everything seems to have been understood, except that each of the parties had some arrangement by which he was to make a secret profit out of the others. Hawkinson must have understood that he was acquiring his rights through Little, because he made the check for $1,000 payable to Little. Little immediately wrote to Nichols, informing him of the transaction, and inclosing the check which was to be deposited as earnest money. From this letter it appears that Little understood that he was purchasing the land for $4.50 an acre and reselling it at an advance to Hawkinson. He informed Nichols that Wakefield had told him that the land was for sale at that price, and that Swickard had wired him that he had a buyer (Frye) at $5.50 per acre "to us." It thus appears that Swickard also understood that Little was buying the land and reselling it at $5.50 per acre. In this letter Little informed Nichols that the sale "is to Hawkinson and others at Osseo, Wis.," and that the purchasers require that "the contract from you to them shall state a price of seven dollars an acre, and the extra one dollar above the six dollars to be acknowledged as paid in the first payment, as they are turning the land to others at seven dollars, and want the contract to show same cost." "We especially desire," he wrote, "that you do not make the fact known to any of these parties that we are getting one dollar an acre above the net cost price to us of $4.50, as the agents presume that we

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are making only fifty cents an acre, and it appears that these agents are also making another commission by placing the land at seven dollars. * * * Should any point arise later that E. R. Swickard, of Dickinson, would address you in this matter, please consider him as one of the principals."

In the dealing with Nichols, who in legal effect was Wakefield, Little thus identified himself as a principal, and referred to Frye and McKenney as agents. Nichols testified that he regarded Little as the buyer. Wakefield also testified that the sale was made to Little, and that he considered that they were bound to sell the land to him at $4.50 per acre. When Hawkinson's check was not paid, Little and Frye went to Wisconsin to see him, and the visit resulted in the check being paid. Immediately thereafter Little saw Nichols, and, as Nichols testified, informed him "that he had sold to Frye at $5.50, who had sold to Hawkinson, who had sold to Mr. McKenney and other parties at seven dollars, and that the contract would have to issue at seven dollars."

When these parties met with Hawkinson at Osseo, Hawkinson informed them that he could not carry the deal through alone, and the evidence shows very conclusively that it was agreed that all the parties present should join in the transaction and carry the deal through. Both Little and Nichols testified that the option was made out to Hawkinson at the request of Little, although Nichols wished to make it to Little, as he had received the check from him, and regarded him as the purchaser. The inevitable inference is that Little considered himself as associated with Hawkinson and that he had an interest in the option. Nichols believed that Little was the purchaser and the deal was subsequently closed with him. When the Hawkinson option was taken up and the contract made with Little, the $1,000 which had been deposited as earnest money was applied on the consideration, and Little paid the balance himself. It does not appear that Hawkinson ever objected to this use of the $1,000, and that fact strongly suggests that Little and Hawkinson were both interested as principals in the option contract. There is nothing to show that Wakefield and Nichols did not act in perfect good faith in allowing Little to take up the option. Wakefield testifies that before doing so he consulted legal counsel, and

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was advised that under the circumstances Little had the right to purchase.

There are some circumstances which point to a different conclusion; but, when the evidence as a whole is considered, it is clear upon the showing made that the plaintiffs failed to prove that Hyslop was entitled to this land, and that the defendants should pay them a commission of $4,273 because they recognized Little's claim of right to carry out the Hawkinson option. Even if Little was not a principal, he was so situated with reference to the transaction that he probably had the right to insist upon carrying the deal through in his own name in order to protect his own profits.

The order is therefore reversed, and a new trial granted.

C. G. ANDERSON and Others v. WISCONSIN CENTRAL RAILWAY COMPANY.[1]

March 5, 1909.

Nos. 15,987—(197).

Announcement of Auction not an Offer to Sell.

An announcement or advertisement that certain property will be sold at auction to the highest bidder is a mere declaration of intention to hold an auction at which bids will be received. It is not an offer to sell, which becomes binding, even conditionally, on the owner when a bid is made.

Bid at Auction Is An Offer.

An auctioneer asks for bids for the property, and a bid is an offer to purchase at the price named. Until the offer is accepted, no contract relations exist.

Before Acceptance Bid May Be Withdrawn.

At any time before the bid is accepted, the bidder may withdraw his offer to purchase or the owner his offer to sell.

Action in the district court for St. Louis county to recover $2,000 for refusal of defendant's auctioneer to accept plaintiffs' bid for a building, that being the highest bid made. The case was tried before

[1] Reported in 120 N. W. 39.

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Ensign, J., and a jury which rendered a verdict in favor of plaintiffs for $1,500. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Reversed with directions to enter judgment for the defendant.

Crassweller & Crassweller, for appellant.

An advertisement of a sale by auction is a mere declaration of intention and does not bind the seller to sell at all, or to sell to any particular bidder, or to accept the highest bid. A bid is a mere offer which binds nobody until accepted by the seller, and the bidder may retract his bid, or the owner withdraw his property at any time before the hammer falls. Clark, Cont. 41–43; 9 Cyc. 280; Addison, Cont. 12; Bateman, Auctions, 30–126; Payne v. Cave, 3 T. R. 148; Blossom v. Railroad Co., 3 Wall. 196; Grotenkemper v. Achtermeyer, 74 Ky. 222; 4 Cyc. 1044.

An auctioneer may use a reasonable discretion in refusing a bid which he believes to be detrimental to the interests of his employer or likely to depress the bidding. Taylor v. Harnett, 55 N. Y. Supp. 988; Holder v. Jackson, 11 U. C. C. P. 543, 546.

Jaques & Hudson, for respondents.

ELLIOTT, J.

The Wisconsin Central Railway Company, having acquired certain real property in the city of Duluth through condemnation proceedings, advertised that at a time and place stated the buildings thereon would be sold at public auction. Bids for a certain house had been made until the amount offered amounted to $675. Anderson then increased his bid five dollars, making his offer $680. The auctioneer refused to consider this bid, because, as he stated, the amount of the raise was too insignificant. After waiting for a time to give Anderson an opportunity to increase it, the auctioneer announced that the house was sold to the last previous bidder for $675. An entry of this sale was made by the auctioneer in his entry book, as required by section 2815, R. L. 1905. Anderson demanded to know why the auctioneer had not accepted his bid, and on the same day he tendered the $680, and it was refused. Before this tender was made a bill of sale of the building had been executed and delivered to the party to whom the building had been knocked down. Anderson then brought this action

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for damages, and recovered a verdict for $1,500. The defendant appealed from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

The conflicting contentions of the parties arise out of fundamentally different conceptions of the nature of an auction. The appellant contends that the advertisement of a sale at auction is a mere declaration of intention which does not bind the owner to sell, or to sell to any particular bidder, and that the contract is not made until the bid is accepted. The complaint charges the defendant with liability for damages resulting to the plaintiffs from its unlawful refusal to sell the building to them and to carry out the terms and conditions of the auction sale. It proceeds upon the theory that, notwithstanding the bid, no sale was in fact made to them, because the defendant refused to recognize their right to purchase. The claim, as stated in the brief, is that "the advertisement constitutes a complete memorandum of a contract, not of sale, but to sell, to the person who should comply with its condition. It follows that as soon as any person complied with the condition, i. e., became the highest bidder at the auction provided for in the writing, this proposal became a binding written contract to sell to that person the building at his bid."

While the action was thus brought for the breach of an agreement to sell to the highest bidder, the argument proceeds upon the theory that under such conditions a contract has its inception in the announcement or advertisement of the owner's intention to sell the designated property at public auction to the highest bidder; that, unless the contrary is expressly stated in the announcement, the sale is to be without reserve; that the bid of the highest bidder is the acceptance of the offer; that the fall of the hammer is an announcement by the agent of the owner that he will wait no longer for a higher bid; and that the one whose bid was highest when the hammer fell is the purchaser without reference to the action of the auctioneer in announcing that some other bidder is the purchaser. Reduced to its lowest terms, this means that the offer to sell is made in the advertisement of intention to sell at auction, and that the contract is completed by the acceptance of that offer by the bidder. There is some ground for this theory, but the decided weight of authority sustains the view that the announcement is a mere statement of intention to hold an auction, and that no

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contract of any character is made until the offer to purchase is accepted by the auctioneer.

The jury, under proper instructions, found that the property was offered without express reservations as to the amount of the bids, that the bid of five dollars was made in good faith, and that under the circumstances the amount was not so small as to justify the auctioneer in declining to consider it on that ground. No exceptions were taken to the instructions which submitted these questions to the jury, and on this appeal we accept the conclusions of the jury as final. The issue is also simplified by the fact that the case involves no question of puffing or by-bidding by the owner, or of fraud or misrepresentation in the announcement of the sale. For the purpose of the argument, we assume the correctness of the respondent's claim that an advertisement or announcement of an auction sale which does not state limitations and conditions is equivalent to the announcement that the sale will be without reserve. The issue of law is thus clearly defined.

The custom of selling goods at auction is as old as the law of sale. In Rome, military spoils were disposed of at the foot of the spear—sub hastio—by auction, or increase. In later times we find a mode of auction called a "sale by the candle," or by the "inch of candle," which consisted of offering the property for sale for such a length of time as would suffice for the burning of an inch of candle. In Holland they inverted the usual process, and put the property up at a price usually greater than its value, and then gradually lowered the price until some one closed the sale by accepting the offer and thus becoming the purchaser. In ancient Babylon the young women were sold at a public auction according to a method which combined the features of the Dutch and ordinary kinds of auctions. The group of prospective wives would ordinarily contain some who, by reason of personal beauty, were thought more desirable than others. The attractive ones were first sold to the highest bidders. When the supply of this quality was exhausted, those less favored by nature were offered and sold to the bidders who would take them with the least dowry, which was payable out of the money received from the sale of the beauties. Herodotus considered this custom very commendable.

In view of the general prevalence of the custom of selling by auction, it is remarkable that no very early cases are found in the English

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reports. The parent case of Payne v. Cave, 3 T. R. 148, was decided by Lord Kenyon, C. J., sitting at Guildhall in 1788. The plaintiff offered a distilling apparatus for sale, including a pewter worm, at public auction, on the usual conditions that the highest bidder should be the purchaser. There were several bidders for the worm, of whom Cave, who bid £40, was the last. The auctioneer dwelt on this bid for some time, until Cave said: "Why do you dwell? You will not get more." The auctioneer stated that he was informed that the worm weighed at least 1,300 cwt., and was worth more than £40. The bidder then asked him if he would warrant it to weigh so much, and, receiving an answer in the negative, he declared that he would not take it. The worm was then resold on a subsequent day for £30, and an action was brought against Cave for the difference. Lord Kenyon ruled that the bidder was at liberty to withdraw his bid at any time before the hammer fell, and nonsuited the plaintiff. On motion to set aside the nonsuit, it was contended that a bidder is bound by the conditions of the sale to abide by his bid, and could not retract; that the hammer is suspended, not for the benefit of the bidder, or to give him an opportunity for repenting, but for the benefit of the seller; and that in the meantime the person who bid last is a purchaser, conditional upon no one bidding higher. But the court thought otherwise, and held that the auctioneer was the agent of the vendor, and that the assent of both parties was necessary to make the contract binding, and "that is signified on the part of the seller by knocking down the hammer, which was not done here till the plaintiff had retracted." "An auction," said the court, "is not inaptly called a locus pœnitentiæ. Every bidding is nothing more than an offer on one side, which is not binding on either side until assented to."

The idea that an action will lie for the breach of an implied undertaking to sell to the highest bidder was advanced in Warlow v. Harrison (1859) 1 El. & El. 309, and dicta supporting it will be found in Harris v. Nickerson (1873) L. R. 8 Q. B. 286, 288, Spencer v. Harding (1870) L. R. 5 C. P. 561, 563, Re Agra Bank (1867) L. R. 2 Ch. App. 391, 397, and Johnson v. Boyes [1899] 2 Ch. Div. 73. These cases assume that an offer to sell property at auction is indistinguishable from the case of an offer to the general public, such as a reward for the return of lost property, where it is held that contract rights are

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created in favor of one who complies with the conditions of the offer. Carlill v. Carbolic [1893] 1 Q. B. 256; Anson, Contracts, p. 52. Langdell seems to be the only text-writer who takes this view of what the law should be. In his Summary of the Law of Contracts (page 24) it is stated that the correct view is "that the seller makes the offer when the article is put up, namely, to sell it to the highest bidder, and that, when a bid is made, there is an actual sale, subject to the condition that no one else shall bid higher." See note to Tillman v. Dunman in 57 L. R. A. 784, 789.

Warlow v. Harrison, supra, the source of all the uncertainty, was an action against an auctioneer who had advertised that he would sell certain horses, "the property of a gentleman, without reserve," at auction. Warlow bid sixty guineas for one of the horses, whereupon the owner bid sixty one guineas. Warlow refused to increase his bid, and the horse was announced as sold for sixty one guineas to the owner. Warlow, claiming to be the highest good-faith bidder, tendered the amount of his bid to the auctioneer and demanded the horse, and, on this being refused, brought an action against the auctioneer, alleging that the defendant was his agent to complete the contract, that he had refused to do so, and that he had thereby lost certain money in attending the auction and had been deprived of the benefit of his contract. The defendant pleaded (1) not guilty; (2) that the plaintiff was not the highest bidder; and (3) that the auctioneer did not become the bidder's agent to complete the sale. The plaintiff recovered a verdict, but the Common Pleas (Lord Campbell, C. J., Wightman, J., and Erle, J.) ordered a nonsuit on the ground that the plaintiff's allegation as to the agency of the defendant and the duty of the defendant to complete the contract on behalf of the plaintiff was not sustained. It was urged in argument that an auctioneer is the agent of the bidder to receive the bid; that the bidder is a conditional purchaser; that, when the sale by the conditions is without reserve, the bidder is absolutely the purchaser, unless there be a bona fide higher bidding; and that the auctioneer, in consideration of the bidding by which a commission will come to him, promises the highest bidder to knock down the article to him and to do all that is necessary to complete the sale. "But this reasoning," said Lord Campbell, "is wholly at variance with the case of Payne v. Cave, 3 T. R.

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148, which has been considered good law for nearly seventy years. That case decided that a bidding at an auction, instead of being a conditional purchase, is a mere offer, that the auctioneer is the agent of the vendor, that the assent of both parties is necessary to the contract, that this assent is signified by knocking down the hammer, and that till then either party may retract. This is quite inconsistent with the notion of a conditional purchase by a bidding, and with the notion of there being any personal promise by the auctioneer to the bidder that the bidding of an intending purchaser shall absolutely be accepted by the vendor. The vendor himself and the bidder being respectively free till the hammer is knocked down, the auctioneer cannot possibly be previously bound."

Holding, thus, that no action would lie against the auctioneer, the court found it unnecessary to consider whether there was any remedy against a vendor who had violated a condition that the property would be sold to the highest bona fide bidder without reserve. In the Exchequer Chamber the decision was affirmed; but, as the plaintiff might amend his declaration, the court discussed the merits of the case which might be made. Barons Martin, Byles, and Watson were of the opinion that the plaintiff was entitled to recover from the auctioneer, because the auction was announced to be "without reserve," which meant that neither the owner nor any one in his behalf should bid at the auction, and that the property would be sold to the highest bidder, whether the sum bid was equivalent to the real value or not. On the principle which creates a contract between the loser of property who offers a reward for its return and the finder, or a railway company which advertises a time-table and one who purchases a ticket, it was said that an auctioneer who put the property up for sale upon such conditions pledges himself that the sale shall be without reserve, and that a contract is made with the highest bidder, who, in case of a breach thereof, has a right of action against the auctioneer. "We think," said Baron Martin, "that the auctioneer has contracted that the sale shall be without reserve; and that the contract is broken upon a bid being made by or on behalf of the owner, whether it be during the time when the property is under the hammer, or it be the last bid upon which the article is knocked down; in either case the sale is not 'without reserve' and the contract of the auctioneer is broken. We enter-

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tain no doubt that the owner may, at any time before the contract is legally complete, interfere and revoke the auctioneer's authority; but he does so at his peril, and, if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified." Baron Bramwell and Willes, J., preferred to rest the judgment upon the ground that the auctioneer had undertaken to have, and yet there was evidence that he had not, authority to sell without reserve.

Mainprice v. Westley (1865) 6 Best & S. 420, was also an action against the auctioneer. The declaration averred that in handbills and circulars it "was stated and represented by [the defendant] that he, the defendant, would offer the said messuage and shop for peremptory sale at public auction" at a day and place named; that the plaintiff, confiding in the statements, attended at the time and place; that the messuage and shop were offered according to the representation; that the plaintiff then bid a price which was the highest bid, except a sum which, to the knowledge of the defendant, was bid by an agent of the vendor contrary to the representation that the sale would be peremptory; and that the defendant refused the plaintiff's offer. It was said that if it had been alleged that any part of the representation had been false to the knowledge of the defendant, and that the plaintiff, by reason of the deceit, had been induced to incur expense by going to the place of auction, the count would have been good. But intentional deceit was not alleged, the plaintiff relying on the claim that there was a contract on the part of the auctioneer that if the plaintiff was the highest bidder the premises would be knocked down to him. It was held that no contract had been proven, because the handbills disclosed that the auctioneer was merely the agent of a principal, the name of whose solicitor was given. If any express contract was made, it was with this solicitor. The court declined to determine whether there was any liability on his part, and merely held that no case had been proven against the auctioneer. Cockburn, C. J., Shee, J., and Blackburn, J., dubitante, were of the opinion that when an auctioneer, without disclosing his principal, advertises a sale without reserve, he personally contracts that there shall be a sale without reserve. But the point was not decided.

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As to Warlow v. Harrison, Blackburn, J., said: "Three learned judges gave their opinion that where an auctioneer advertised a sale without reserve, not disclosing in any way who his principal was, he personally contracted that there should be a sale without reserve. Two other learned judges did not agree in this view, and it appears ultimately that the court of Exchequer Chamber pronounced no other judgment than that the pleadings should be amended to enable the parties to raise the question unless they consented to a stet processus, which they did. We do not think, therefore, that we are precluded by this, as a judgment of a court of error; and, if necessary, we should be at liberty to consider the question whether, even in a case where the name of a principal is not disclosed by an auctioneer, there is a contract by the latter such as is now insisted on."

In Harris v. Nickerson (1873) L. R. 8 Q. B. 286, the nature of the advertisement was considered, and it was held that it should be construed as a mere declaration of intention, which did not amount to a contract with any one who might act upon it, or constitute a warranty that the articles advertised would be offered for sale. Certain articles were not offered, and a party who attended for the purpose of bidding brought an action to recover for his loss of time and expense. Blackburn, J., said: "This is certainly a startling proposition, and would be excessively inconvenient if carried out. It amounts to saying that any one who advertises a sale by publishing an advertisement becomes responsible to everybody who attends the sale for his cab hire and traveling expenses." Referring to Warlow v. Harrison, the learned judge remarked that "the opinion of the majority of the judges in the Exchequer Chamber appears to have been that an action would lie for not knocking down the [property] to the highest bona fide bidder when the sale was advertised as without reserve; in such a case it may be that there is a contract to sell to the highest bidder, and that if the owner bids there is a breach of the contract." Quinn, J., was also of the opinion that the particular action could not be maintained without going to the extent of saying that where an auctioneer issues an advertisement of the sale of goods, if he withdraws any part of them without notice, the persons attending may all maintain actions against him. He was of the opinion, however, that when a sale is advertised without reserve, and a lot is put up and bid for, there is

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ground for saying, as was said in Warlow v. Harrison, that a contract is entered into between the auctioneer and the highest bona fide bidder. But that rule was not applicable to the case under consideration, as the property was never put up for sale, and it was impossible to say that there was a contract with every one attending the sale. The real point in the case was brought out by Justice Archibald, who said: "This is an attempt on the part of the plaintiff to make a mere declaration of intention a binding contract. He has utterly failed to shew authority or reason for the proposition. If a false and fraudulent representation had been made, it would have been quite another matter. But to say that a mere advertisement that certain articles will be sold by auction amounts to a contract to indemnify all who attend, if the sale of any part of the articles does not take place, is a proposition without authority or ground for supporting it."

In re Agra Bank (1867) L. R. 2 Ch. App. 391, held that the holder of a letter of credit is the agent of the writer for the purpose of entering into a contract. Lord Cairns referred to Warlow v. Harrison and Denton v. Great Northern, 5 El. & Bl. 860, as analogous cases. In Spencer v. Harding, L. R. 5 C. P. 561, it appeared that the defendant had sent out circulars inviting offers for a stock of goods. Mr. Justice Willes said that, "if the circular had gone on, 'and we undertake to sell to the highest bidder,' the reward cases would have applied, and there would have been a good contract in respect of the persons. But the question is, whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of the goods, and to receive offers for the purchase of them." It was held that the circular contained no words intimating that the highest bid would be accepted.

In Johnston v. Boyes [1899] 2 Ch. 73, it appeared that Boyes had advertised the freehold of a public house for sale at auction under conditions providing that the highest bidder should be the purchaser. The plaintiff, a married woman of financial standing, sent her husband to bid for her, but did not supply him with the necessary funds. The property was knocked down to him; but the auctioneer, who knew that he was financially irresponsible, refused to accept his check for the amount of the required deposit and sold the property to

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another person. The husband assured the auctioneer that his wife would furnish the money to make the check good, and the court found that his statement was true. The plaintiff sued the vendors for breach of the contract that the highest bidder should be the purchaser. It was held that the bidder had not complied with the conditions of sale, which required that the deposit should be in cash. This disposed of the case; but the court stated that the action could have been maintained, had the deposit been tendered in cash and the highest bidder been refused the property. "A vendor," said Cozens-Hardy, J., "who offers property for sale by action on the terms of the printed conditions can be made liable to a member of the public who accepts the offer if those conditions be violated"—citing Warlow v. Harrison, 1 El. & El. 295, and Carlill v. Carbolic [1893] 1 Q. B. 256.

But the doctrine of Warlow v. Harrison was never generally acquiesced in, and in Lord Halsbury's Laws of England, vol. 1, p. 511 (n), doubt is expressed as to its correctness. In a recent English edition of Benjamin, Sales (1906) page 487, the learned editors say that "two points were involved in Warlow v. Harrison, viz.: (1) Is an announcement that a sale will be without reserve, or will be made to the highest bidder, an offer of a contract with the highest bona fide bidder, and accepted by his bid? (2) When an auctioneer, acting for an undisclosed principal, makes such an announcement, does he thereby offer to contract personally? Although technically Warlow v. Harrison may not have been an actual decision upon these points, yet there was the strongest intimation of opinion in the affirmative on both points on the part of three judges, from which the other two did not dissent, and the case has been subsequently treated as actually deciding them. On the second point, however, the personal liability of the auctioneer acting for an undisclosed principal, the case was doubted by Cockburn, C. J., and Shee, J., in Mainprice v. Westley, because the employment of an auctioneer necessarily involves the character of agent only, and therefore, prima facie, he does not contract personally. * * * As pointed out by a learned writer [Pollock on Contracts, pp. 17, 19], Warlow v. Harrison involves the theory that bidding at an auction, advertised to be without reserve is not, as in other cases, a mere offer, but a conditional acceptance; the condition being that no higher bidder presents himself. But this theory cannot hold

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good under s. 58 (2) of the code, as the sale is not complete until the fall of the hammer, so that until then neither party is bound. Yet, when once the goods are put up, there may, perhaps, be an implied contract not to withdraw them"—citing Johnston v. Boyes, supra.

In commenting on Warlow v. Harrison, Sir Frederick Pollock says that "the opinions expressed by the judges, therefore, are not equivalent to the actual judgment of a court of error, and have been in fact regarded with some doubt in a later case where the court of Queen's Bench decided that at all events an auctioneer whose principal is disclosed by the conditions of sale does not contract personally that the sale shall be without reserve." Pollock, Cont. (Williston's Ed.) p. 18, citing Mainprice v. Westley, supra. It is now settled that the fact of disclosure or nondisclosure of the principal is immaterial. Woolfe v. Horne (1877) L. R. 2 Q. B. D. 355; Rainbow v. Howkins [1904] 2 K. B. 322.

Sale of Goods Act 1893 (St. 56 & 57 Vict. c. 71) § 58 (2), provides that "* * * (2) a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid." It was held in the Scotch case of Fenwick v. MacDonald, [1904] 6 F. (Ct. of Sess.) 850, that, whatever may have been the law formerly, this statute entitles a bidder to withdraw his bid at any time before the fall of the hammer, and the vendor must be equally free to withdraw his offer to sell, because one party cannot be bound while the other is free. But in the recent case of McManus v. Fortescue, [1907] 2 K. B. 1, some support was again given to Warlow v. Harrison. It appeared that the property was actually knocked down to the highest bidder at a price below the reserve, and it was held that the bidder had no right of action against the auctioneer, either for breach of duty, or for refusing to sign a memorandum or otherwise complete the contract, or for breach of warranty of authority to accept the bid. Lord Justice Cozens-Hardy, in agreeing with this disposition of the case, said: "I am of the same opinion, and I only desire to add one remark. This action was really launched on the lines of Warlow v. Harrison, but in my opinion the attempt to set up an analogy between the two cases fails. The Exchequer Chamber had there to consider a case in which the sale was

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advertised to be without reserve, and the auctioneer was sued by a man who claimed to be the highest bidder; the only bid overtopping his being that of the vendor. The court said that the defendant, the auctioneer, might be liable on the ground that he had contracted that the sale was to be without reserve and had broken that contract. Here the contract between the parties is subject to the reserve, and that contract has not been broken, and consequently the plaintiff has no cause of action."

The Canadian cases of McAlpine v. Young, 2 Ch. Chamb. (Ont.) 85, and O'Connor v. Woodward, 6 Pr. (Ont.) 223, seem to approve the doctrine of Warlow v. Harrison; but Holder v. Jackson, 11 U. C. C. P. 543, is to the contrary. The plaintiff there rested his claim on the theory that an auctioneer at a public auction must receive the bid of any person present and does a wrong to any person whose bid he refuses to receive. After conceding, on the authority of Warlow v. Harrison, that, when the sale is advertised to be without reserve, the auctioneer cannot receive a higher bid on the behalf of the owner to the prejudice of the preceding bidder, the court said: "But in such a sale as is stated in this count, I do not understand on what ground any person can claim as a right to be allowed to bid—to offer to become a purchaser. It will be going beyond any authority I have seen to hold that by holding an auction under such circumstances there is an implied duty or contract to deal with any person who presents himself and that the auctioneer, with due regard to his responsibilities to his principal has not a right to refuse to deal with any particular person. The principal might refuse from mere caprice to sell to A., B., or C., and might direct the auctioneer to refuse to sell to certain parties; and I can see no reason why the auctioneer (the agent) is bound by law to accept offers or bids, any more than his principal would be." See Cull v. Wakefield, 6 U. C. Q. B. (O. S.) 178.

In the United States a distinction has sometimes been made between ordinary private and judicial and official sales, but the only difference seems to be that the latter may require the approval of the court. Clifford, J., in Blossom v. Railroad Co., 3 Wall. 196, 18 L. Ed. 43.

In Corryolles v. Mossy, 2 La. 504, the court approved the rule stated by Chancellor Kent (2 Comm. 537) that a bid is no more than an

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offer on one side which is not binding until accepted by the auctioneer; but the decision was rested on the construction of a provision of the Louisiana Code.

In Newman v. Vonderheide, 11 Wkly. L. Bul. (Ohio) 123, it was said that, "when property offered at public auction is withdrawn before the acceptance of a bid, there is no contract of sale, and the highest bidder cannot compel a conveyance by an action for specific performance, or obtain damages for refusal to convey."

Miller v. Baynard, 2 Houst. 559, 83 Am. Dec. 168, and Hartwell v. Gurney, 16 R. I. 78, 13 Atl. 113, both cases of puffing, give some support to the doctrine of Warlow v. Harrison. In the latter it was held that the vendor cannot hold the bidder when the price has been run up by means of puffing. The statement of the court that "an offer to sell at auction is an offer to sell to the highest bidder, and every bid is an inchoate acceptance, entitling the bidder to the property offered, if it turns out to be the highest, and there is no retraction on either side before the hammer falls," must be read in connection with the facts of the case which was under consideration.

Taylor v. Harnett, 26 Misc. 362, 55 N. Y. Supp. 988, holds that an auctioneer has the right to refuse to accept a bid which is a trifling advance, where the sum offered is not commensurate with the actual known value of the property. In the course of the decision the court said: "Their claim is that, as a matter of law, where an auctioneer advertises a sale at public auction, and in response to this invitation bidders attend, an implied contract arises between them that the property will be knocked down to the highest bidder, for a breach of which an action will lie against him at the suit of such bidder. There is no case in this state which is directly in point with the proposition advanced. The question, however, seems to have been determined in England in the case of Warlow v. Harrison, 29 L. J. (N. S.) 18, in the Exchequer Chamber, on error from the Queen's Bench. There it was held, as the headnote expresses it, that if the auctioneer inserts in the conditions of a sale by auction that the property is to be sold 'without reserve,' he by so doing contracts with the highest bona fide bidder that the sale shall be without reserve; and the contract is broken if, during the auction, a bid is made by or on behalf of the owner of the property sold,

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and in such case the auctioneer is liable to an action at the suit of the highest bona fide bidder."

It has been held that the highest bidder at a judicial sale is entitled, as a matter of law, to the property. State v. Johnston, 2 N. C. 293; McLeod v. McCall, 48 N. C. 87, 89; Gilbert v. Watts, 169 Ill. 129, 48 N. E. 430, 61 Am. St. 154; Morton v. Moore, 4 Ky. Law 717. But the decided weight of authority is otherwise. Knox v. Spratt, 19 Fla. 817, 833; Rogers v. Cleveland, 132 Mo. 442, 458, 34 S. W. 57, 31 L. R. A. 335, 53 Am. St. 494; Davis v. McCann, 143 Mo. 172, 178, 44 S. W. 795. See also Keightley v. Birch, 3 Camp. 521.

Blossom v. Railroad Co., supra, holds that the highest bidder at a judicial sale at public auction, whose bid has not been accepted, cannot require that the sale be confirmed to him. Mr. Justice Clifford said:

"Biddings at an auction, says Mr. Addison, are mere offers, which may be retracted at any time before the hammer is down and the offer has been accepted. [Addison on Contracts (Ed. 1857) 26.] Leading case upon that subject is that of Payne v. Cave, [3 T. R. 148,] where it was expressly held that every bidding at an auction is nothing more than an offer on one side until it has received the assent of the auctioneer as the agent of the owner. Supreme Court of Pennsylvania held, in the case of Fisher v. Leitzer [23 Pa. St. 308, 62 Am. Dec. 335] that a bidder at a sheriff's sale has a right to retract his bid before the property is struck down to him, and that the sheriff has no right to prescribe conditions which will deprive him of such a right. Express ruling was that a bid at an auction before the hammer falls is like an offer before acceptance, and that when the bid is withdrawn before it is accepted there is no contract, and that such a bidder cannot be regarded in any sense as a purchaser. Rule, as laid down in the last edition of Story on Sales, is substantially the same as that adopted in the preceding case. Speaking of ordinary sales at an auction, the author says that the seller may withdraw the goods or the bidder may retract his bid at any time before they are struck off, and the reason assigned for the rule is, that so long as the final consent of both parties is not signified by the blow of the hammer there is no mutual agreement to a definite proposition. 1 Sugden, Vendors & Purchasers, 25. But as soon as the hammer is struck down, says the same author,

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the bargain is considered concluded, and the seller has no right afterwards to accept a higher bid nor the buyer to withdraw from the contract. [Rutlidge v. Grant, 4 Bing. 653; Cook v. Oxley, 3 T. R. 654; Adams v. Lindsell, 1 Barn. & Ald. 681; Story, Sales, 461.] Same rules prevail upon a sale under common-law process as in other cases of sales at public auction, so far as respects the question now before the court. Until the property is actually struck off to the bidder he may withdraw his bid as a mere offer or proposition.

"Judicial sales made under the decretal orders of courts of chancery, are also, in this country, governed substantially by the same rules, except that such sales are usually made by the marshal, or master in chancery acting as an officer of the court, * * * and subject to the power of the court to set the sale aside for good cause shown, or open it at any time before it has been confirmed, if the circumstances of the case require the exercise of that power. * * *

"Subject to those qualifications, and perhaps some others which need not be noticed, the question of sale or no sale, when it arises under a state of facts such as are exhibited in this record, may be fully tested by substantially the same rules as those which apply in cases of sales under common-law process, or in other cases of sales at public auction. Tested by those rules, it is clear to a demonstration that there was no sale of the mortgaged premises in this case, because the property was never struck off to the appellant, nor was his bid, by act or word, or in any manner, ever accepted by the seller, and the record shows that, at the hearing in the court below, nothing of the kind was pretended by the appellant. Instead of setting up that pretense, his complaint was that the marshal erred in refusing to accept his bid, which, if possible, is less defensible upon the facts and circumstances of the case than the theory of the sale and purchase."

In Boyd v. Greene, 162 Mass. 566, 39 N. E. 277, an auction sale of certain real estate had been advertised to take place without reserve. The plaintiff bid $1,725 for the property, and the auctioneer told him that if he would bid $1,750 the property would be knocked down to him. The bid was made; but the auctioneer, after consulting with the owner, then announced that the property would not be sold for $1,750. After referring to Warlow v. Harrison and the other English cases in which it had been cited, the court said: "The case at bar is not an

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action to recover for the trouble and expense of attending the auction under the inducement held out by the defendant in the advertisement. See Harris v. Nickerson, supra. It is an action to recover damages because the defendants, through their agent, the auctioneer, did not sell the property to the plaintiff, and did not do what was necessary to make a valid sale of the property to him, as they had agreed to do." The court held that, even if the conversation between the auctioneer and bidder did amount to a contract, it was unenforceable, because within the statute of frauds. White v. Dahlquist, 179 Mass. 425, 60 N. E. 791.

The recent case of McPherson v. Okanogan, 45 Wash. 285, 88 Pac. 199, 9 L. R. A. (N. S.) 748, is very like the one at bar. The county advertised property for sale at public auction to the highest and best bidder. The complaint alleged that the plaintiff was the highest and best bidder, and that the defendant refused to knock down the property to it and demanded that the defendant be required to convey the property to it. A demurrer to the complaint was sustained. On the appeal the appellant contended that, since its bid for the property when it was offered for sale was the highest and best bid, it was the duty of the auctioneer to strike off the property to it, and that the failure so to do could not affect its right to have the sale completed. After citing Blossom v. Railroad Co., 3 Wall. 196, 18 L. Ed. 43, and other cases, the court said: "Measured by the tests thought sufficient in these cases, the offer to sell the property and a bid therefor by the appellant did not create a contract of sale between the county and the appellant, nor his bid accepted, and, there being no contract of sale between the parties, there is no contract capable of being specifically enforced." It was also held that the officer making the sale was clothed with a certain discretion as to refusing a bid, when in his judgment it was not made in good faith or was made in such a sum as would amount to a virtual sacrifice of the property. To the same effect is Warehime v. Graf, 83 Md. 98, 34 Atl. 364, which held that the contract was not complete until the property was knocked down to the highest bidder.

In Ives v. Tregent, 29 Mich. 390, Mr. Justice Cooley said: "The assignees had put an auctioneer in charge of the sale, and must be understood to authorize him to speak for them. When he accepts a bid

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and knocks down the property, a bargain is closed." Tillman v. Dunman, 114 Ga. 406, 40 S. E. 244, 57 L. R. A. 784, 88 Am. St. 28, holds that it is the right of an executor offering land at sale at public auction to withdraw the same at any time before the hammer falls, which, of course, could not be done if the contract was complete when the bid was made.

The earnestness with which the respondent contends that the trial court was right in holding that the contract was complete when the bid was made, conditional on there being no higher bid, has induced us to make a somewhat extended examination of the authorities. The result discloses the fact that there has been running through some of the English cases a recognized, but never applied, principle which would sustain the right of action in such a case as the present. But all the cases in which the doctrine is recognized were decided on other grounds. No substantial support for the doctrine is found in the American cases. It is, in fact, utterly irreconcilable with principles which are universally recognized.

Mutuality is an essential element of a contract. One party thereto cannot be bound, and the other remain free. If the announcement of an auction is an offer to sell to the highest good-faith bidder, and the contract is closed when the bid is made, both the vendor and the vendee must be bound thereby. But it is conceded by all the authorities that the bidder may withdraw his bid at any time before the hammer falls, and this means necessarily that the bid is a mere offer which is not binding until accepted. Grotenkemper v. Achtermeyer, 74 Ky. 222; Hibernia v. Behnke, 121 Cal. 339, 53 Pac. 812; Fisher v. Seltzer, 23 Pa. St. 308, 62 Am. Dec. 335; Dunham v. Hartman, 153 Mo. 625, 55 S. W. 233, 77 Am. St. 741; Payne v. Cave, 3 T. R. 148; Blossom v. Railroad Co., supra; 1 Halsbury, Laws of England, § 1039; 1 Dart, Vendor & Purchaser, 200; 1 Benjamin, Sales (5th Eng. Ed.) p. 66; Story, Sales (4th Ed.) § 461; Baker, Sales, § 550; Bateman, Auctions, § 30; 1 Warvelle, Vendors & Purchasers, § 247; note to Tillman v. Dunman, 57 L. R. A. 784; 4 Cyc. 1044; 3 Am. & Eng. Enc. (2d Ed.) p. 501; 1 Sugden, Vendors & Purchasers (14th Ed.) 21; Willams, Vendors & Purchasers, 19; Auctions & Auctioneers, 8 South. L. Rev. 555. English Sales of Goods Act 1893, § 58 (2), expressly provides that every bidding being but an offer on one side, which is bind-

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ing on neither until assented to. Similar provisions are found in the statutes of California (Civ. Code, § 1794) and North Dakota (Rev. Codes 1905, § 5438).

On principle and authority the correct rule is that an announcement that a person will sell his property at public auction to the highest bidder is a mere declaration of intention to hold an auction at which bids will be received; that a bid is an offer which is accepted when the hammer falls, and until the acceptance of the bid is signified in some manner neither party assumes any legal obligation to the other. At any time before the highest bid is accepted, the bidder may withdraw his offer to purchase or the auctioneer his offer to sell. The owner's offer to sell is made at the time through the auctioneer, and not when he advertises the auction sale. A merchant advertises that on a certain day he will sell his goods at bargain prices; but no one imagines that the prospective purchaser, who visits the store and is denied the right to purchase, has an action for damages against the merchant. He merely offers to purchase, and if his offer is refused, he has no remedy, although he may have lost a bargain, and have incurred expense and lost time in visiting the store. The analogy between such a transaction and an auction is at least close. As the advertisement in this case was a mere statement of intention to offer the property for sale at public auction to the highest bidder, the respondent's bid did not complete either a contract of sale or a contract to make a sale.

The question of the application of the statute of frauds has been fully argued; but it disappears from the case when we reach the conclusion that no contract of any kind was entered into between the parties.

The order is therefore reversed, with directions to enter judgment for the defendant.

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CARL ODEGARD v. J. B. LEMIRE.[1]

March 5, 1909.

Nos. 16,064—(272).

Notice of Appeal in Election Contest.

The provision of the statute (R. L. 1905, § 336) as to the filing of the notice of an appeal in an election contest and the service thereof on the contestee is mandatory, and unless the notice is both filed and served within ten days after the canvass is completed no jurisdiction to hear the contest is acquired by the court.

From the decision of the canvassing board for Aitkin county, declaring the contestee, J. B. Lemire, elected auditor of that county, the contestant, Carl Odegard, appealed to the district court which issued an order to show cause. The contestee could not be found and was not served with notice of appeal within the time limited by statute, but appeared specially and objected to further proceedings being had in the matter on the ground that the court had not acquired jurisdiction. From an order, McClenahan, J., discharging the order to show cause, contestant appealed. Affirmed.

Charles C. Teare, for appellant.

The filing of the notice of appeal with the clerk of the district court confers jurisdiction on the court. Contestant has until the last minute of the tenth day to file this notice and after that may cause a copy of the notice to be served on the contestee, otherwise this provision of the statute conflicts with the later provision of the same section which requires the notice to be served in the same manner as a summons in a civil action. Sutherland, St. Const. § 238 (1891 Ed.)

If the ten day limit applies to service on the contestee, it is directory only. Hadley v. Gutridge, 58 Ind. 302; Buckland v. Goit, 23 Kan. 327. Statutes concerning the manner of conducting elections are directory only unless non-compliance is expressly declared to be fatal. Sutherland, St. Const. § 452. The object of the statute is to ascertain

[1] Reported in 119 N. W. 1057.

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the will of the people as expressed by the ballots. The public, as well as the contestant and contestee, is interested in the result.

F. W. Hall, for respondent.

START, C. J.

The parties hereto were rival candidates at the last general election for the office of auditor of the county of Aitkin. The respondent on November 11, 1908, was declared, by the county canvassing board, elected by a majority of four votes. The appellant within ten days thereafter, and on November 20, filed with the clerk of the district of the proper county a notice of appeal, specifying the points upon which the contest would be made, from the decision of the canvassing board; but he did not serve a copy of the notice of appeal upon the contestee, the respondent herein, until November 24. On application of the contestant the court made an order requiring the contestee to show cause on November 30 why inspectors should not be appointed to inspect and recount the ballots. The contestee appeared specially on the return day of the order, and objected to any further proceedings in the matter, and made a motion to discharge the order, for the reason that the court had never acquired jurisdiction to hear the appeal. The court made its order granting the motion on the ground that notice of appeal was not served within the time required by the statute (R. L. 1905, § 336), and the contestant appealed from the order.

It may be conceded that he used diligence to get service on the contestee within ten days next after the completion of the canvass of the votes, but failed so to do because the contestee could not be found; nor was any person occupying the house of his usual abode. The statute (R. L. 1905, § 336), so far as here material is as follows: "Any voter may contest the election of any person for or against whom he had the right to vote, who is declared elected to a state, county, or municipal office * * * by proceeding as follows: He shall file with the clerk of the district court of the county of his residence, within ten days after the canvass is completed, a notice of appeal to such court, specifying the points upon which the contest will be made, and cause a copy thereof to be served upon the contestee when the contest relates to the election of an officer * * * upon the auditor when it affects a single county. * * * They [the notices] shall be served in the same manner as a summons in a civil action. * * *"

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The first contention of the contestant is that the limitation of ten days found in the statute applies only to filing the notice of the appeal with the clerk. If this be correct, then there is no time limit as to the service of the notice of appeal on the contestee, which would enable the contestant to defer the hearing of the contest to suit his convenience and pleasure, and, further, as said by the learned trial judge, it "would introduce an element of uncertainty and confusion into the prescribed procedure for which there is no occasion and which is entirely at variance with its previous legislative history." Prior to the Revision of 1905 the statutes of the state relating to election contests uniformly required the service of the notice of appeal to be filed in the office of the clerk of the court and served upon the contestee within a time expressly stated and limited. G. S. 1866, c. 1, §§ 29, 46, 49; G. S. 1894, §§ 172, 186, 190. The provision of the statute (Laws 1901, p. 584, c. 365) in force when R. L. 1905 were enacted required the notice of appeal in an election contest to be filed in the office of the clerk of the district court within ten days after the decision of the canvassing board and service of notice of such contest upon the contestee in the manner provided for the service of a summons in a civil action within ten days after the filing of the notice of appeal. In view of the fact that all prior statutes relating to election contests expressly limited the time within which the notice of appeal was to be served on the contestee, section 336, R. L. 1905, cannot be construed as changing the legislative policy in this respect and leaving the time for such service unlimited, if the language used is susceptible of any other reasonable construction, for changes in language made by a revision of the statutes are not to be regarded as altering the law, unless it be clear that such was the intention. State v. Stroschein, 99 Minn. 248, 109 N. W. 235; Becklin v. Becklin, 99 Minn. 307, 109 N. W. 243.

It is, however, urged by counsel for contestant that the manifest intention of the legislature was not to limit the time for the service of a copy of the notice of appeal on the contestee; for the statute provides that the service shall be made in the same manner as a summons in a civil action—that is, either personally or by publication. The claim is without merit, for the reason that the provision as to the manner of service is the identical provision found in Laws 1901, p. 584, c. 365, which expressly limited the time within which service could be made.

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Construing the statute here in question with reference to its language, history, and purpose, it is clear that it was not intended to make a radical change in the prior law, and that a copy of the notice of appeal must be served on the contestee within ten days after the decision of the board of canvassers. We are of the opinion that the statute is not susceptible of any other reasonable construction, and we so construe it.

The further contention of the contestant is that the statute, as to the service of the notice of appeal, is in any event merely directory, and that a service made only after the expiration of the ten days does not affect the jurisdiction of the court. We cannot so hold.

The right to appeal from the decision of the board of canvassers is purely a statutory one, which the legislature may withhold or give on such terms and conditions that it deems proper. The statute in question gives the right to contest an election by appeal to the district court only by proceeding as therein specified. Compliance with such proceeding is a prerequisite to the acquisition of jurisdiction by the court to hear the contest; that is, to the perfection of the appeal. Or, in other words, if the appeal is not taken in the manner and within the time required by the statute, the court acquires no jurisdiction. Baberick v. Magner, 9 Minn. 217 (232); Borer v. Kolars, 23 Minn. 445; Seeley v. Killoran, 53 Minn. 290, 55 N. W. 132; Duryea v. Sibley, 76 Minn. 55, 78 N. W. 865. In the last case cited the court said: "This statutory requirement as to the entering of the notice of appeal is not to be regarded as a mere matter of form, but a substantial mandatory requisite, and must be strictly complied with, or no legal appeal is perfected. It is the only method provided by statute, and the notice must be framed, issued, served and entered as required by the statute, or no jurisdiction is acquired."

It is true, as suggested by the contestant, that in the cases cited the failure to comply with the statute related only to the filing of the notice of appeal with the clerk; but the filing and serving of the notice are equally a part of the proceeding by which an appeal can only be taken. This court having repeatedly held that the filing of the notice within the time limited is mandatory and jurisdictional, it follows that the service of the notice is also mandatory and jurisdictional. We hold, not only upon authority, but upon principle as well, that the provision of the statute as to the filing of the notice of appeal and as to the serv-

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ice thereof on the contestee is mandatory, and that, unless the notice is both filed and served within ten days after the canvass is completed, no jurisdiction is acquired by the court to hear the contest.

Order affirmed.

STATE v. B. F. NELSON.[1]

March 12, 1909.

Nos. 15,743, 15,744—(39, 40).

Right to Deduct Debts is Statutory.

The right to deduct debts from credits is purely a statutory one, which the legislature may grant or withhold on such conditions as it deems proper. R. L. 1905, § 836, gives such right only upon the condition that the person claiming such deduction makes affidavit as therein provided. The defendant did not comply with the condition in this case.

Taxation of Foreign Stocks.

Sections 794, 797, R. L. 1905, providing for the taxation of all shares of stocks in foreign corporations owned by residents of this state, are constitutional.

Stock Not Assessed Properly Excluded.

The defendant was the owner of such stock, but it had never been listed or assessed in any manner for taxation. *Held*, that the trial court correctly excluded the omitted stock as a factor in determining the amount of the judgment herein for taxes on personal property.

Defendant was cited before the district court for Hennepin county to show cause why he should not pay the sum of $818.96, as taxes for the year 1906 upon his personal property. He made answer and the matter was tried before Brooks, J., who found in favor of the state in the sum of $447.85. From a judgment entered pursuant to the findings, both parties appealed. Affirmed on both appeals.

Edward T. Young, Attorney General, *Al. J. Smith*, County Attorney, and *W. C. Leary*, Assistant County Attorney, for the State.

Wilson & Mercer, for defendant.

[1] Reported in 119 N. W. 1058.

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START, C. J.

Judgment was entered in the district court of the county of Hennepin in favor of the state and against the defendant, Nelson, in the sum of $447.85 for personal property taxes for the year 1906. Both parties appealed from the judgment.

There is little, if any, dispute as to the material facts, which are as follows: The defendant at all times herein stated was a resident of the city of Minneapolis and a citizen of this state and of the United States. He made no return that year of his personal property for taxation. Thereupon the assessor on June 12, 1906, listed for taxation as his personal property certain items of personal property, consisting of household goods, automobiles, carriages, and other articles, of the aggregate value of $3,735, as to which there is no controversy. The list contained no credits nor stocks. On July 5, 1906, the assessor, upon a separate list, listed other personal property for taxation as the property of the defendant, describing it as "credits other than of banks, bankers, brokers, or stock jobbers," and arbitrarily assessed and valued the same at $50,000. The defendant duly appeared and made timely objection to the second assessment. Thereupon the city board of equalization reduced the item of credits to $25,000, leaving the defendant's total assessment for personal property at $28,735, which, less the exemption of $100, was the basis of his personal property taxes, for the year 1906, $744.51. On May 1, 1906, the defendant was the owner of shares of the capital stock of a foreign corporation, organized and having its property in the state of Washington, where it paid taxes on its property, of the value of $20,000, none of which was listed for taxation, either by the defendant, or the assessor, or any board of equalization, and was not included in or covered by the item of "credits." The corporation owned no property in this state. On that day the defendant was the owner of credits to the amount of $13,600, none of which was listed by him. He was then indebted in the sum of $61,500, but he failed at any time to make any affidavit stating the residence of any person to whom he owed any debt and its character. He stated, in reference to his indebtedness, in an affidavit presented to the board of equalization, this: "Owing to banks, $20,000; owing to individuals, $41,500"—and nothing more. Nor did he on the trial, nor at any time so far as the record discloses, make this statement as to his indebted-

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ness any more specific, except to state that $21,000 of it was for the purchase price of the stock.

The trial court, as a conclusion of law, found that the defendant was not entitled to deduct from his credits an indebtedness owed by him, because he had failed to make an affidavit as required by R. L. 1905, § 836, and that no part of the tax claimed by the state could be sustained by reason of the stock owned by the defendant, as it was never listed or assessed for taxation in the year 1906. This left the aggregate amount of the assessment $17,335, and the tax was reduced accordingly.

1. The assignments of error on the part of the defendant are to the effect that the assessment was arbitrary and void; hence the court erred in holding any portion of the tax valid, and also in adjudging that the defendant by his failure to return a list of his personal property for taxation lost the right to offset his debts against his credits, and, further, that the judgment deprives the defendant of his property without due process of law. The question so raised must be determined with reference to the precise facts of this case and the statute and judicial decisions of our own state relating to the assessment of personal property for taxation and the collection of the same.

Now the short, unpoetic facts of this case are that the defendant made no return of his taxable personal property to the assessor as the law required; that the assessor, in default of such return, arbitrarily assessed and valued his credits in the sum of $50,000, which presumably he believed to be the true value thereof, in the absence of definite information which the defendant might have furnished but did not; that he had notice of such assessment, and appeared before the board of equalization, and filed an affidavit as to his credits and debts, which as to his debts was clearly insufficient, if he desired to have deducted his debts from his credits; and, further, that on the trial the tax on credits was sustained only to the extent of their actual value, without any deductions for debts. It is clear that, if the defendant by the decision of the court is required to pay a greater tax than he would have been required to pay if there had been a deduction of his debts from his credits, it is the result of his own failure to comply with the law, and not of any arbitrary action of any public officer or erroneous decision of the court. This conclusion follows from the decisions of this

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court, which are to the effect that the right to deduct debts from credits for the purpose of taxation is purely a statutory one; hence the legislature may withhold the right or grant it on such conditions as it deems proper. Our statute (R. L. 1905, § 836) gives the right only upon the express condition that the person claiming the deduction makes an affidavit stating the names and residences of the persons to whom he owes the debts, and showing that they are bona fide, and that such right can only be secured by a substantial compliance with this express condition, which is a reasonable and businesslike one. State v. Willard, 77 Minn. 190, 79 N. W. 829; State v. London & N. A. Mtge. Co., 80 Minn. 277, 83 N. W. 339. The case of State v. Northern Pacific Ry. Co., 95 Minn. 43, 103 N. W. 731, has no application to this case for the decision in that case rests upon its exceptional facts.

We hold for the reasons stated that the trial court did not err in holding that the defendant had lost his right to offset his debts against his credits, and that the judgment herein does not deprive him of his property without due process of law.

2. The appeal of the state raises the question whether shares of the capital stock of a foreign corporation, whose property is not within this state and which is taxed in the state of its origin, owned by a resident of this state is subject to taxation in this state; and, if so, did the trial court err in holding that the stock here in question could not be taken into consideration in determining the amount for which judgment should be awarded? R. L. 1905, § 794, and section 797, subd. 10, provide that:

"Property Subject to Taxation.—All real and personal property in this state, and all personal property of persons residing therein, including the property of corporations, banks, banking companies, and bankers, is taxable, except such as is by law exempt from taxation."

"Personal Property Defined.—Personal property, for the purposes of taxation, shall be construed to include":

"10. All shares in foreign corporations owned by residents of this state."

This statute in express terms makes all shares in foreign corporations owned by residents of this state subject to taxation therein. The propriety and justice of such a statute is a mooted question, with which

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courts have nothing to do, if it be constitutional. Counsel for the defendant contends that it is not, for the reason that it violates sections 1 and 3 of article 9 of the state constitution as to equality and uniformity in taxation, and, further, that it is double taxation of the same property. The taxation of the stock of a corporation and of its property in the same state may be admitted to be double taxation, for a certificate of stock in a corporation in its last analysis is simply the evidence of the holder's interest in the property of the corporation. The fact, however, in this case, is that the corporation, a part of whose stock the defendant owns, paid no taxes in this state on any of its property. The fact that it paid such taxes in the state of its origin is no bar to the taxation of its stock owned by a resident of this state and having a situs in the state of his domicile. The tax laws of other states have no extraterritorial force, and the rules for the taxation of property having a situs within this state are to be determined by its laws. State v. William Deering & Co., 56 Minn. 24, 57 N. W. 313.

The statute in question does not violate the mandate of our constitution as to uniformity and equality in taxation nor deny to a resident holder of shares of stock in a foreign corporation the equal protection of the laws, in that such stock is taxed, but stock of a domestic corporation is not. The constitutional provisions of this state as to equality and uniformity of taxation have reference only to property within this state, and neither the statutes of another state nor the action of its taxing officers can affect the question. In the case of a stockholder in a domestic corporation, he is taxed in this state on his interest in the corporation when the corporation pays the tax on its property; but in the case of a foreign corporation, a resident holder of its stock is not and cannot be taxed in this state on his interest in the property of such corporation, except by taxing therein his shares of stock. The result is that each of such stockholders is taxed once, and once only, on his property within the state, and that the statute, eliminating the laws and acts of taxing officers of other states, is equal and uniform in its operation as to persons and property within the state. The statute in question substantially in its present form has been in force for some thirty five years, and, so far as we are advised, this is the first time that its constitutionality has been raised in this court.

In the case of Bacon v. Board, 126 Mich. 22, 85 N. W. 307, 60 L.

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R. A. 321, 86 Am. St. 524, a statute providing for the taxation of shares in foreign corporations owned by citizens of the state of Michigan and exempting from taxation shares in a domestic corporation whose property was taxed within the state was held constitutional, and that it was immaterial that the property of the foreign corporation was taxed in the state of its domicile. In the case of Kidd v. Alabama, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669, a similar statute of the state of Alabama was held to be constitutional, and in so doing the court said: "The state of Alabama is not bound to make its laws harmonize in principle with those of other states. If property is untaxed by its laws, then for the purpose of its laws the property is not taxed at all. * * * It is said that the state may not tax a man because by fiction his property is within the jurisdiction, and then discriminate against him upon the fact that it is without. The state does nothing of the kind. It adheres throughout to the fiction, if it be one, that the stock, the property of the plaintiff in error, is within the jurisdiction."

We hold sections 794 and 797, R. L. 1905, providing for the taxation of all shares of stock in foreign corporations owned by residents of this state, to be constitutional.

The last question to be considered is whether the trial court erred in holding, in effect, that the value of defendant's stock could not be taken into consideration in determining the amount of his taxes for which judgment should be awarded. It is obvious that the stock was neither listed nor assessed, nor intended to be. We have, then, a case where a party is cited to appear in court and show cause why judgment should not be taken against him for a specified amount of taxes based upon an assessment of household goods and other named property and credits. He appears and shows that he had less than one-half the amount of credits he was assessed for; but it appears that he had stock which the court held taxable exceeding the deficiency in the amount of credits for which he was assessed. The question is whether the court can, then and there, render judgment for the full amount claimed for personal property taxes by treating the credits as if they had been listed, valued, and the tax levied thereon. It is certain that this could not have been done under our former system of collecting personal property taxes; for it would be, in effect, the making of a new assess-

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ment and levy by the court. Thompson v. Davidson, 15 Minn. 333 (412); Jaggard (Minn.) Tax. 342.

In the case cited it was held that a tax assessed upon a quantity of wheat attempted to be listed under the head of household goods was invalid. It is provided by our present system of collecting taxes by proceedings in court that the citation shall be prima facie evidence that all provisions of law relating to the assessment and levy of taxes have been complied with, and that no omission in the proceedings prior to the issuance of the citation shall be a defense, unless it is made to appear that such omission has resulted to the prejudice of the party objecting. R. L. 1905, § 896. It is the claim of the state, in effect, that by virtue of this statute the trial court should have sustained the entire tax, for the reason that the defendant ought to have been assessed for personal property in the sum exceeding the full amount of his assessment; hence he was not prejudiced. The statute in question is a remedial one, and must be and has been liberally construed, to the end that the claim of the state for its just and necessary revenue may not be defeated by technical defenses; but it was not intended to deprive property owners of the benefit of statutory safeguards and meritorious defenses. In re Cloquet Lumber Co., 61 Minn. 233, 63 N. W. 628.

The case of State v. Duluth Gas & Water Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63, illustrates the character of irregularities which will be disregarded unless prejudice is shown. In that case the property of the defendant in question was in fact assessed by the assessor and the assessed valuation increased by the county board and auditor; but the method of such assessment and increase was irregular. Nevertheless judgment was awarded for the full amount of taxes claimed, because it did not appear that the property was overvalued by the increase; hence there was no prejudice. Such, however, is not the case at bar, for there never was any attempt to assess the stock; that is, it was property omitted in the assessment of 1906 and liable to be placed by the county auditor, not by the court, on the assessment and tax books for that year. R. L. 1905, § 803. If the trial court had taken into consideration such omitted property in determining the amount of the judgment to be awarded in this case, it is difficult, in view of section 803, to see why the defendant would not have been substantially prej-

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udiced thereby. We hold that the court correctly excluded the omitted stock as a factor in determining the amount of the judgment in this case.

Judgment affirmed on both appeals.

MARIA BREMER v. ST. PAUL CITY RAILWAY COMPANY.[1]

March 12, 1909.

Nos. 15,810—(118).

Right of Way—Street Car and Pedestrian.

A street car company does not acquire by its conferred franchise a servitude or right to priority of way upon the highway, as does an ordinary freight or passenger railway company, by gift, voluntary transfer for consideration, or condemnation with compensation, as to land over which it runs its tracks. A street car and a footman or vehicle have equal rights of the same kind to the concurrent use of the city streets.

Same.

The rights and duties of both are reciprocal and mutual. Each is bound to exercise commensurate care in self-protection and in avoiding harm. Such care on the part of the street car company is differentiated from that of an ordinary user of the street, because its tracks make the side movements of its cars impossible, and because it is authorized to operate heavy cars, with powerful motive force, by reason of which the momentum and inertia of its cars differ from that of ordinary vehicles.

Passing Cars.

At a street crossing, or at a place used as a street crossing, the motorman in charge of a car approaching one discharging passengers is bound to keep a sharp lookout for passengers or other persons who may attempt to cross the tracks behind the other car, to have his car under such control that he can stop it upon the appearance of danger, and to give such signals as are usually given to protect travelers who are in the exercise of ordinary prudence.

Same—Duty of Traveler.

The traveler on the street under such circumstances has the right to rely on the exercise of such care by the motorman, but is required to

[1] Reported in 120 N. W. 382.

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exercise due care in protecting himself and in avoiding harm. Such care does not amount to the caution required to be exercised where the highway crosses the track of an ordinary railway. The traveler is not under a hard and fast obligation to stop, or to look and listen.

Negligence—Question for Jury.

Where the evidence of the plaintiff shows actual negligence on the part of the company, and the question of contributory negligence of plaintiff depends on a variety of circumstances, from which different minds may reasonably arrive at different conclusions as to whether contributory negligence should be found or not, the question should be submitted to the jury under proper instructions, and it is error in such a case for the court to direct verdict for the defendant.

Same.

In this case plaintiff, a passenger on defendant street car company's west-bound car, arrived in daytime at a place not the intersection of streets, but which had been recognized and in this case was recognized by defendant as a place for discharging passengers. She followed another passenger, who had alighted before her, who crossed the track ahead of her in safety. Another car of defendant, which was loaded with crushed rock, passed the car from which plaintiff had alighted, and struck and carried her one hundred feet from the point of collision. There was contradiction in the testimony as to the speed at which it was going and as to whether it gave the usual signals. In an action to recover for consequent personal injuries it is *held* that the questions of defendant's negligence and plaintiff's contributory negligence were for the jury.

Action in the district court for Ramsey county to recover $10,100 damages for personal injuries. The case was tried before Olin B. Lewis, J., and a jury which returned a verdict in favor of plaintiff for $2,000. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

W. D. Dwyer and *W. R. Duxbury,* for appellant.

McElwee & Hollihan, for respondent.

JAGGARD, J.

Plaintiff and respondent, a woman sixty five years of age, was a passenger on a street car of defendant and appellant's railway company. The car stopped at her signal, at a point about half way between two cross streets, where plaintiff had often gone out of the cars to attend to business. Another passenger had left the car in front of her, and

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passed behind it. She followed him directly and "wanted to follow him farther on." The car from which she alighted was going west. As she was going diagonally across the street, she was struck by an east-bound work car. She testified: "I heard nothing, no bell and nothing, and it hit me on the legs, and I fell down, and thereafter I didn't know anything any more."

The jury might have inferred that plaintiff collided with the east-bound car at a point four feet back of the fender; but her testimony and the circumstances in connection with the place of fracture and laceration of her right leg and the distance from its fender to the top of the rail were sufficient to have justified a finding that she was struck by the fender in front of the approaching car. It must be here assumed that it so found. The distance between the inside rails of the double tracks was such as to leave a clearance not to exceed eighteen to twenty four inches between the cars when opposite to each other. One of the defendant's witnesses testified that the work car, loaded with crushed rock, was going only three or four miles an hour; but there was also testimony that the usual rate of speed at that point was ten or twelve miles an hour, and that the work car ran one hundred feet after it struck plaintiff. The witness who alighted ahead of plaintiff heard and saw the construction car. Thereupon he "kind of obliqued to the left and crossed the track, at the same time motioned to the party following him and also to the employees with [his] hand like this (indicating), and just about that time the front end of the car came between [him] and the party who followed, * * * the lady, and [he] heard a scream and at the same time * * * the appliance of the emergency brake, or something of that kind."

Other testimony on the point was more favorable to the plaintiff. The jury returned a verdict for plaintiff in the sum of $2,000. This appeal was taken from the order of the trial court denying defendant's motion in the alternative.

Defendant's negligence must be assumed. Its brief does not contend that actionable negligence was not shown. Moreover, as will appear from the consideration of plaintiff's negligence, which immediately follows, the question was for the jury. The only controversy here is whether plaintiff as a matter of law was guilty of contributory negligence.

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The primary fallacy, which in fact, although not in phrase, underlies defendant's contention that plaintiff was so guilty, and which is frankly avowed by some authorities cited to sustain it, is that a street railway company has some superior or paramount right on a public street to that of a passenger or driver of vehicles. This view, it is true, is sustained by a more or less clearly defined group of cases which secure to a street car system power to use public streets almost equal to that of a railroad company to use its tracks. For example, see Chicago v. Meinheit, 114 Ill. App. 497; Denver City T. Co. v. Norton, 141 Fed. 599, 73 C. C. A. 1; Gray v. Fort, 198 Pa. St. 184, 47 Atl. 945 (see post); Minnich v. Wright, 214 Pa. St. 201, 63 Atl. 428, and subsequent discussion of rule as to "stop, look, and listen." Three considerations are currently relied upon to confer upon street railways the priority of way, viz., that their tracks necessitate a fixed course, which makes it impossible to turn cars to the side; that such companies are generally authorized to propel heavy cars by powerful motor force, in consequence of which the momentum and inertia of street cars differ from that of ordinary vehicles; and that general convenience demands rapid and undeterred transit by such public service companies. Upon the most casual reflection, however, it will clearly appear that the conclusion does not follow from these premises. Due allowance may be made for all these considerations. The lawful use of streets by street cars on the one part, and by footmen and vehicles on the other, may be differentiated by due reference to these circumstances; and none the less the common-law rights of ordinary users of the highway, though somewhat modified by them, may still be preserved in substance. In other words, the common-law rules as to the use of public highways may be merely adapted to new conditions imposed by the weight, power, and tracks of a street car, its inability to move sidewise, and its momentum.

There is a natural and necessary difference between the fundamental right of an ordinary freight and passenger railroad to its right of way and the right of the street car company to use the streets of a city. The railroad company, by gift, voluntary transfer for consideration, or condemnation with compensation, secures a fee or an incorporeal hereditament, and operates its roads by virtue of ownership; the street car company obtains a privilege to build its tracks and operate its cars

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without gift, purchase, or condemnation of land. That privilege creates no new servitude upon the highway, but makes possible an additional use of such highway, consistent with and in furtherance of the purposes of its original dedication. The railroad company may have an estate; the street car company always has a franchise. The lands over which a railroad company builds its road are withdrawn from general or private use; the surface of a street is open to common travel. The way of a railroad company is used by it exclusively, subject to limited rights at public or private crossings; a street is used concurrently by the street car company and by the public. Kinsey v. Union, 169 Ind. 563, 81 N. E. 922; Indianapolis v. Kidd, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143 (collecting cases at page 145); Attorney General v. Metropolitan, 125 Mass. 515, 28 Am. 264; Robbins v. Springfield, 165 Mass. 30, 42 N. E. 334; Benjamin v. Holyoke, 160 Mass. 3, 35 N. E. 95, 39 Am. St. 446; Hall v. Odgen, 13 Utah, 243, 258, 44 Pac. 1046, 57 Am. St. 726; Newark v. Block, 55 N. J. L. 605, 27 Atl. 1067, 22 L. R. A. 374; Citizens' v. Camden, 33 N. J. Eq. 267, 36 Am. 542; Lawler v. Hartford, 72 Conn. 74, 43 Atl. 54; Clark v. Bennett, 123 Cal. 275, 55 Pac. 908; Spiking v. Consolidated, 33 Utah, 313, 93 Pac. 841; Pilmer v. Boise, 14 Idaho, 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254; United Railways v. Watkins, 102 Md. 264, 62 Atl. 234, 2 Current Law, 1762, 4 Am. & Eng. An. Cas., 449, note.

Every traveler has an equal right on public streets to every part thereof with any other traveler, including street railways. The railway company can obtain a superior right only by condemnation. It has no priority of way. Id. And see Laufer v. Bridgeport, 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 537. Even in New York (see post) it has been held that as to persons who have occasion to cross the highway the rights of the street car are precisely the same in kind as the right of other persons or vehicles. Dunican v. Union, 39 App. Div. 497–500, 57 N. Y. Supp. 326; Sesselmann v. Metropolitan, 65 App. Div. 484, 72 N. Y. Supp. 1010; O'Neil v. Dry Dock, 129 N. Y. 125, 29 N. E. 84, 26 Am. St. 512. This is certainly the rule in this state. Shea v. St. Paul City Ry. Co., 50 Minn. 395, 399, 52 N. W. 902; Holmgren v. Twin City R. T. Co., 61 Minn. 85, 63 N. W. 270; Watson v. Minneapolis Street Ry. Co., 53 Minn. 551, 55 N. W. 742; Kennedy

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v. St. Paul City Ry. Co., 59 Minn. 45, 60 N. W. 810; Smith v. Minneapolis Street Ry. Co., 95 Minn. 254, 104 N. W. 16.

The mutual rights of travelers and street cars to use public streets impose the duty on both to exercise mutual care. The rights and duties of both are reciprocal. Shea v. St. Paul City Ry. Co., supra; Pilmer v. Boise, supra. Both are required to exercise care. Neither is bound to anticipate negligence on the part of the other. On the one hand, the motorman ordinarily is justified in assuming that a person using the highway will exercise ordinary care for his own protection (8 Current Law, 2023, note 32), and that no one will attempt to cross the tracks so close in front of a moving car as to render a collision probable. See, for example, Baly v. St. Paul City Ry. Co., 90 Minn. 39, 42, 95 N. W. 757; Bresee v. Los Angeles, 149 Cal. 131, 85 Pac. 152, 5 L. R. A. (N. S.) 1059.

The general rule is none the less certain that at a street crossing, or at a place used as a street crossing, the motorman in charge of a car approaching one discharging passengers is bound to keep a sharp lookout for passengers or other persons who may attempt to cross the tracks behind the standing or moving car, to have his car under such control that he can stop it upon the appearance of danger, and to give such signals as will usually protect travelers who are in the exercise of ordinary prudence. Louisville v. Hudgins, 124 Ky. 79, 98 S. W. 275, 7 L. R. A. (N. S.) 152. And see Chicago v. Robinson, 127 Ill. 9, 18 N. E. 772, 4 L. R. A. (N. S.) 126, 11 Am. St. 87; Cincinnati St. Ry. Co. v. Whitcomb, 66 Fed. 915, 14 C. C. A. 183; Birmingham v. City, 119 Ala. 615, 24 South. 558, 72 Am. St. 955. The more specific rule, as was said in Capital v. Lusby, 12 App. Cas. (D. C.) 295, 301, is that, "when a train has stopped to let off or take on passengers, a train on the reverse course should never be allowed to pass the stopping train, except it be on such caution and noticeable signals as are reasonably calculated to avoid the possibility of injury to passengers. Every passenger is entitled to full protection against injury as far as human agency employed in the management of the cars can afford it, and especially is this care required while the passenger is getting on or making exit from the train. The passenger is entitled to this protective care of the railroad company until he or she is entirely free of danger from the movement of the cars on the tracks either way, as-

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suming, of course, that the passenger is using reasonable care for his or her own safety and protection. However desirable rapid transit may be, it can only be lawfully accomplished in subordination to the strict observance of proper and safe rules and regulations for the security of life and limb of the public." The rule in this state accords. In Watson v. Minneapolis Street Ry. Co., 53 Minn. 551, 55 N. W. 742, Gilfillan, C. J., said: "At a street car crossing as high a degree of care is required of those in charge of an electric car as [of other persons using the highway.]" And see Gray v. St. Paul City Ry. Co., 87 Minn. 280, 91 N. W. 1106; Peterson v. Minneapolis Street Ry. Co., 90 Minn. 52, 55, 95 N. W. 751.

On the other hand, a traveler on a street has a right to rely on the exercise of prudence conforming to the standard of law by the motorman, and is not bound to anticipate negligence on his part. O'Brien v. St. Paul City Ry. Co., 98 Minn. 205, 108 N. W. 805; 10 Current Law, 1746. Thus, where he has alighted from a car, and is passing behind it, and undertakes to cross another track, "he no doubt had a right to expect that any car which might be upon the other track would not run at a dangerous rate of speed and would be lawfully managed." (Creamer v. West End, 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. 456), and that it would be under such control as would enable it to protect the rights of others, and that it would give the usual warning of its approach (Scott v. San Bernardino, 152 Cal. 604, 93 Pac. 679; Spiking v. Consolidated, 33 Utah, 313, 93 Pac. 841; Binns v. Brooklyn, 89 App. Div. 359, 361, 85 N. Y. Supp. 874; Evansville v. Gentry, 147 Ind. 408, 44 N. E. 311, 37 L. R. A. 378, 62 Am. St. 421; Smith v. Minneapolis Street Ry. Co., 95 Minn. 254, 257, 104 N. W. 16; White v. Wilmington [Del. Super.] 63 Atl. 931). "There is no priority of right, so that the right of neither is exclusive. * * * Life and limb are of more consequence than quick transit. * * * The opposite doctrine appears to have found lodgment in many minds, and there seems to be a disposition to assume that a foot passenger has no right upon a public street as against a street car. Indeed, common observation seems to show that this belief controls the conduct of drivers of many conveyances, public and private. Too often there is a reckless disregard of human life and limb, and pedestrians are compelled, at their peril, to keep out of the way. As a matter of law, it is

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as much the duty of the vehicle to keep out of the way of the footman, and especially so at crossings, as it is for the latter to escape being run over, giving due consideration to the great difficulty of guiding and arresting the progress of a vehicle." Spear, J., in Cincinnati v. Snell, 54 Oh. St. 197, 43 N. E. 207, 209, 32 L. R. A. 276.

The traveler himself, however, owes the duty to exercise due care in protecting himself and in avoiding harm. Exactly what constitutes such care is the subject of some difference in opinion. In some jurisdictions that care is held to be practically the same as the caution required of travelers about to cross the tracks of an ordinary freight and passenger railroad upon a rural highway; that is, he must at his peril "stop, look and listen." For example, see Hoelzel v. Crescent, 49 La. An. 1302, 22 South. 330, 38 L. R. A. 708; Hornstein v. United, 195 Mo. 440, 92 S. W. 884, collecting cases at 887, 4 L. R. A. (N. S.) 729, 113 Am. St. 693. This is the rule in Pennsylvania. Berger v. Philadelphia R. T. Co. (C. C.) 141 Fed. 1020.

That this position is not tenable clearly appears from what has been previously said as to the primary distinction between the mutual rights and duties recognized by law as existing between users of the highway and of a street car company. Moreover, not only are the incident perils different, but, while to stop at a country crossing is not only prudent, but safe, to stop on the streets of a city is often as dangerous as to proceed. The pedestrian's duty is to be considered in connection with his justified presumption that the street car company, having no priority of way, will be careful especially at a crossing. Accordingly, the general rule is that the same care or watchfulness is not required in crossing a street car track as in crossing a railway track. Lynam v. Union, 114 Mass. 88, per Gray, J.; Robbins v. Springfield, 165 Mass. 30, 42 N. E. 334; Hall v. West End, 168 Mass. 461, 47 N. E. 124; White v. Worcester, 167 Mass. 43, 44 N. E. 1052; Marden v. Portsmouth, 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. 476 (a leading case); Newark v. Block, 55 N. J. L. 614, 27 Atl. 1067, 22 L. R. A. 374; Consolidated v. Scott, 58 N. J. L. 682, 34 Atl. 1094, 33 L. R. A. 122, 55 Am. St. 620; Richmond v. Garthright, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. 839; Richmond v. Gordon, 102 Va. 498, 46 S. E. 772; Chauvin v. Detroit, 135 Mich. 85, 97 N. W. 160; Pilmer v. Boise, supra; Spiking v. Consolidated,

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supra; Perjue v. Citizens, 131 Iowa, 710, 109 N. W. 280; Kramm v. Stockton, 3 Cal. App. 606, 86 Pac. 738, 903; Niemyer v. Washington, 45 Wash. 170, 88 Pac. 103; Saylor v. Union, 40 Ind. App. 381, 81 N. E. 94.

More specifically, persons crossing street railway tracks in a city are [not] obliged to stop, as well as look and listen, before crossing such tracks, unless there is some circumstance which would make that ordinarily prudent. Taft, J., in Cincinnati St. Ry. Co. v. Whitcomb, 66 Fed. 915, 14 C. C. A. 183; Evansville v. Gentry, 147 Ind. 408, 44 N. E. 311, 37 L. R. A. 378, 62 Am. St. 421. Failure to look and listen may constitute contributory negligence as a matter of law. Hooks v. Huntsville, 147 Ala. 700, 41 South. 273; Blackwell v. Old Colony, 193 Mass. 222, 79 N. E. 335; Price v. Rhode Island (R. I.) 66 Atl. 200; Phillips v. Washington, 104 Md. 455, 65 Atl. 422.

The rule as to the requirement of looking and listening is not a "hard and fast one" (Mitchell, J., in Holmgren v. Twin City R. T. Co., 61 Minn. 85, 87, 63 N. W. 270; Shea v. St. Paul City Ry. Co., 50 Minn. 395, 52 N. W. 902); nor does "it apply with the same force" as at a railroad crossing (Lovely, J., in Metz v. St. Paul City Ry. Co., 88 Minn. 48, 92 N. W. 502. And see Shea v. St. Paul City Ry. Co., supra; Smith v. Minneapolis Street Ry. Co., 95 Minn. 254, 259, 104 N. W. 16, and cases there collected) nor "in its strict sense" (Capital v. Lusby, 12 App. Cas. [D. C.] 295). And it has been held that mere "failure to look and listen does not per se constitute negligence." Spear, J., in Marden v. Portsmouth, 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 303, 109 Am. St. 476. In Pilmer v. Boise, supra, Sullivan, J., quotes from Richmond, J., in Richmond, P. & P. Co. v. Gordon, 102 Va. 498, 46 S. E. 772, and approves the following instructions as a correct statement of the law: "While, generally speaking, one who is about to cross a street railway should both look and listen for cars, this is not an inflexible rule; nor is it to be enforced with any such strictness as in the case of an ordinary steam railway. It is not negligence as a matter of law to omit to do so. The question is whether men of ordinary prudence, exercising ordinary care and prudence, would have thought it unnecessary to do so." And see Evansville v. Gentry, 147 Ind. 408, 411, 412, 44 N. E. 311, 37 L. R. A. 378, 62 Am. St. 421. Indeed, mere failure to look, it has been held, does not necessarily prevent recovery. Benjamin v. Holyoke, 160 Mass. 4, 35 N. E. 95, 39 Am. St. 446.

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In the nature of things, when failure to look and listen constitutes negligence must depend on the peculiar circumstances of each case. As Brown, J., said in Russell v. Minneapolis St. Ry. Co., 83 Minn. 304, 307, 86 N. W. 347: "Failure to look and listen might be conclusive, or at least very strong, evidence of negligence in one case, and in another of no particular controlling force at all. The ultimate determination of the question must depend largely in each case on the circumstances." And see Start, C. J., in Curran v. St. Paul City Ry. Co., 100 Minn. 58, 110 N. W. 259, and O'Brien v. St. Paul City Ry. Co., 98 Minn. 205, 108 N. W. 805. In this state there is no presumption that the traveler was guilty of contributory negligence. The burden is on the defendant to prove it. Holmgren v. Twin City R. T. Co., supra; Cf. Evansville v. Gentry, supra; Cf. New York rule, post. Whether defendant has borne the burden is ordinarily a question for the jury. Terien v. St. Paul City Ry. Co., 70 Minn. 532, 73 N. W. 412; Scott v. San Bernardino, 152 Cal. 604, 93 Pac. 679; Clark v. Bennett, 123 Cal. 275, 55 Pac. 908.

The authorities which involve circumstances similar to those in the instant case accord with and require the confirmation of the order of the trial court refusing to hold that plaintiff was as a matter of law guilty of contributory negligence. It will conduce to convenience in this case, first, to distinguish allied, but different, cases, and, second, to consider the most nearly specific cases.

First. The only decisions which are properly in the same group with the case at bar are those in which the traveler has approached the place of danger to a point where his view is obstructed, and where circumstances imposed on the car company the duty of anticipating the presence of passengers and of controlling the car and giving warning accordingly. For, while passengers have a right to cross in front of a standing car (Kennedy v. St. Paul City Ry. Co., 59 Minn. 49, 60 N. W. 810), and while one is not guilty of contributory negligence in walking in a street car track laid in a public highway in the exercise of due care and caution (Goff v. St. Louis, 199 Mo. 694, 98 S. W. 49, 9 L. R. A. [N. S.] 245; and note Indianapolis v. Kidd, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. [N. S.] 143, 8 Current Law, 2022, note 29), the user of the highway knows that the motorman has a right to rely

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upon his observation of the dictates of prudence, and is not bound to anticipate an attempt to cross in front of the car.

Cases in which a pedestrian, starting from the curb or like place where the approach of the car or cars can be seen, has walked in front of the car and has been held guilty of contributory negligence, are not in point. Terien v. St. Paul City Ry. Co., supra; Metz v. St. Paul City Ry. Co., supra; O'Brien v. St. Paul City Ry. Co., supra; Pittsburg Ry. Co. v. Cluff, 149 Fed. 732, 79 C. C. A. 438.

Ames v. Waterloo, 120 Iowa, 640, 645, 95 N. W. 161, to which defendant refers us, is not apt. Plaintiff there stepped from behind, not a street car, which had stopped to allow passengers to alight, but from behind a covered wagon under circumstances in which the court expressly pointed out he was "in no way distracted nor interfered with by surrounding circumstances or conditions either in seeing the car or avoiding it." And see Hafner v. St. Louis, 197 Mo. 196, 94 S. W. 291; Hageman v. North Jersey, 74 N. J. L. 279, 65 Atl. 834. So, in the case of a person attempting to cross a street at a point where his view was obstructed, not by a car which had stopped for passengers, but by a car which was passing in ordinary transit, the situation was correspondingly different from that in the instant case. See Thompson v. Buffalo, 145 N. Y. 196, 39 N. E. 709, in which a child of fourteen, attempting to cross a street in the middle of a block, ran behind a passing car without looking to see if a car was approaching on another track, and was held negligent as a matter of law. Cf. Downs v. St. Paul City Ry. Co., 75 Minn. 41, 77 N. W. 408.

Of the authorities which are properly in the class to which the instant case belongs, none to which our attention has been called, or which our somewhat extended search has revealed, require or justify holding the plaintiff guilty of contributory negligence as a matter of law. Some of them are differentiated by the presence of features wholly wanting here and by the absence of the distinctive facts appearing in this record. Thus in Creamer v. West End, 156 Mass. 320, 324, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. 456, the approaching car was open, well lighted, and filled with a crowd of shouting and singing passengers, and warning was shouted to plaintiff, who had alighted from the departing car. Other cases, also, as Morice v. Milwaukee,

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129 Wis. 529, 109 N. W. 567, involving the presence of a headlight in operation, are not in point; for this accident happened in the day time.

In many of such authorities the distinction rests on differences, not only in circumstances, but also in the rules of law in the jurisdictions in which they were rendered. Defendant has referred us to a number of New York cases. As will presently be pointed out, even in that state, under the present circumstances, this case would have gone to the jury; but it is to be borne in mind that under some later decisions of the courts of that state the law is that "street railway cars between crossings have a preference." The pedestrian must stop, look, and listen, satisfy himself that the way is clear, and exercise essentially the same care with respect to a street car track as with respect to a railroad track. See Thompson v. Buffalo, supra, in which many cases are referred to; Doyle v. Albany (Sup.) 39 N. Y. Supp. 440; McGreevy v. New York (Sup.) 98 N. Y. Supp. 1024, in which it is to be noted that Houghton, J., did not think that the alighting passenger was guilty of contributory negligence as a matter of law. This case was decided after Reed v. Metropolitan, 180 N. Y. 315, 73 N. E. 41. In Axelrod v. New York (Sup.) 95 N. Y. Supp. 1072, under circumstances similar in general to those at bar, but without its destructive features, the deceased was held guilty of contributory negligence; but it was also held "that plaintiff has the burden of proving freedom from contributory negligence." However, for example, in Moebus v. Herrmann, 108 N. Y. 349, 354, 15 N. E. 415, 2 Am. St. 440, involving similar facts to those at bar, except that injury was inflicted by an ordinary carriage, the court said the duty imposed upon the wayfarer in crossing the street between the tracks of a railroad to look both ways does not as a matter of law attach to such persons when about to cross from one side of the street to the other in a city street. The degree of caution which he must exercise would be affected by the situation and the surrounding circumstances. And there are many other New York cases inconsistent with these defendant has selected. See ante.

The difference both in law and in circumstance appears also in Gray v. Fort, 198 Pa. St. 184, 47 Atl. 945, to which defendant refers us. There, after alighting, the plaintiff started towards the other track without stopping, or looking, or listening, and was immediately

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struck by a car on that track. He was warned of his danger by the motorman of the car following the car from which he had alighted, and could have saved himself if he had heeded the warning. The court said: "When Mr. Gray alighted from the car onto the street he was in a place of safety, and it was his duty to remain there or to go to the sidewalk, and wait until the road was clear, or until he could see that it was clear." It has previously been shown that the relevant principles of law generally recognized and in force in this state are at right angles with the bases of the decisions. See Indianapolis v. Tenner, 32 Ind. App. 311, 67 N. E. 1045. But see elaborate dissenting opinion by Roby, J., 32 Ind. App. 318, 67 N. E. 1047, and Hornstein v. United, 195 Mo. 440, 92 S. W. 884, 4 L. R. A. (N. S.) 729, 113 Am. St. 693, in which the alighting passenger was held guilty of contributory negligence because "the plaintiff did not stop for a moment, that he might have unobstructed view of the track and see whether or not it was safe to proceed across the street."

Second. Even of the most nearly specific cases, none involve identical facts. Some of them have, however, determined that certain features of this case alone were sufficient to require the submission of the question of contributory negligence to the jury. Thus contradictory testimony as to the way usual signals or warnings were given has been held sufficient to raise the issue of fact. Dobert v. Troy City (Sup.) 36 N. Y. Supp. 105 (as to a plaintiff who had alighted from another car); Chicago v. Loomis, 201 Ill. 118, 66 N. E. 348 (as to passenger at crossing). In Stevens v. Union, 75 App. Div. 602, 78 N. Y. Supp. 624, affirmed 176 N. Y. 607, 68 N. E. 1125, the motorman failed to slacken speed and to give warning as he approached and passed a car on another track going in an opposite direction. The car struck the passenger, who had alighted from another car, and carried him forty or forty five feet beyond the place of collision. This was sufficient to make the question of negligence and contributory negligence for the jury. And see Binns v. Brooklyn, 89 App. Div. 359, 85 N. Y. Supp. 874. In the instant case the passenger was carried one hundred feet. In Pelletreau v. Metropolitan, 74 App. Div. 192, 77 N. Y. Supp. 386, affirmed 174 N. Y. 503, 66 N. E. 1113, a passenger who had alighted and passed behind a north-bound car, and who was approaching a southerly track, was injured by a passing

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car. A companion had preceded plaintiff and crossed successfully. The court said: "The space between the north-bound car and the west track was slight and plaintiff's vision in the northerly direction was obscured by the car behind which she passed, and, as she heard no gong sounded or other warning of an approaching car, we cannot say that she was guilty of contributory negligence because she may have erred in thinking she could follow her companion in safety." The most nearly analogous case in this jurisdiction is Peterson v. Minneapolis St. Ry. Co., 90 Minn. 52, 95 N. W. 751. There the attention of the alighting passenger, seventy years of age, was distracted by the circumstance that another car was approaching on the same track and a boy on a bicycle was racing with it. Here contributory negligence was held to be for the jury. The principles there applied would determine this case as did the trial court.

Defendant refers us to Downs v. St. Paul City Ry. Co., 75 Minn. 41, 77 N. W. 408, where a boy familiar with the situation passed in front of a car barn and was injured by a car issuing from it. The court said: Plaintiff "was bound to exercise ordinary care. It may be conceded that he was not, as a matter of law, bound to stop and look through the doorway before crossing the tracks; but it was negligence for him to heedlessly trot along in front of the opening and only two feet therefrom, without doing anything to ascertain whether a car was coming out, knowing that one might come out at any moment." The rule deducible from the cases most nearly in point is that: Where the evidence of the plaintiff shows actionable negligence on the part of the company, and the question of contributory negligence of the plaintiff depends upon a variety of circumstances, from which different minds may reasonably arrive at different conclusions as to whether there was contributory negligence or not, the question should be submitted to the jury under proper instructions; and it is error in such case for the court to direct a verdict for the defendant.

In the light of these general principles and of these special authorities, the conclusion of the learned trial judge that plaintiff was not guilty of contributory negligence as a matter of law must be confirmed. It will be assumed that her rights and duties were determined by the rule laid down in Creamer v. West End, 156 Mass. 320, 322, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. 456, as follows: "One who steps

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from a street railway car to the street is not upon the premises of the railway company, but upon a public place where he has the same rights with every occupier, and over which the company has no control. His rights are those of a traveler upon the highway, and not of a passenger." But plaintiff was not a trespasser, nor was she undertaking to cross a railway track. The rights of plaintiff and defendant to use the street were mutual, and their duties to take care reciprocal. The place at which she was injured was in the settled portion of the city, where there was considerable travel, and was governed by rules applicable to urban traffic. It was not at the intersection of streets, but had been and in this case was recognized by defendant essentially as a stopping place for passengers and as a crossing. When plaintiff alighted and passed behind the car she had left, she was bound to exercise commensurate care in the highest sense to avoid injury. Her view was obstructed by the projecting back of a retreating car. She was not as a matter of law negligent under the circumstances of this case because she did not stop or step back or return to the sidewalk until the retreating car had gone far enough to enable her to see whether a car was approaching on the other track. She had the right to rely on the exercise of due care on the part of the motorman of such car in giving usual signals, in having his car under reasonable control, and in going at a slow speed. She was not required to reason that he might be negligent and to govern herself accordingly. She heard no bell. She saw another passenger who had left the car in which she had come pass behind it as she was doing. As she followed him, she saw him cross the southerly track. This the jury might have found was a natural assurance of safety.

The significance of the gesture of her fellow passenger, exactly what it was, when it was given, where she was at the time, whether she saw it or should have seen it, what effect it should have had under the circumstances, and what she could have done if it had been a caution, were regarded by the trial court questions for the jury. A fortiori that view must be taken here. The trial judge saw the gesture. It is merely indicated on the record before us. There was other testimony, beside that of the man ahead, favorable to plaintiff's contention. The jury might reasonably have found that, acting on the reassurance of his conduct, plaintiff had prudently undertaken to cross,

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and moving slowly—she was sixty five years of age—and with due caution had acquired such an impetus which carried her beyond the very slight distance—eighteen inches—between the cars as made it impossible for her to retreat before the car coming at a dangerous rate of speed struck her. The fact that it carried her one hundred feet was, as was pointed out in the New York case, persuasive not only of the presence of defendant's negligence, but also of the absence of contributory negligence on her part.

It follows that the order of the trial court in refusing to grant defendant's motion must be affirmed.

Affirmed.

THOMAS CHRISTIANSEN v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and Another.[1]

March 12, 1909.

Nos. 15,944—(208).

Issue not Pleaded—Aider by Verdict.

A complaint alleged specific acts as negligence, and contained a general allegation that the defendants otherwise negligently conducted themselves, and were guilty of such careless and negligent acts, omissions, and conduct that by reason thereof, or by reason of each and all of the aforesaid negligent and careless acts, and each of them, the plaintiff was injured. No motion to make more specific was made, and at the trial evidence was received without objection tending to show a negligent act not specifically charged in the complaint, and that issue was submitted to the jury. *Held*, that the act thus proven must, after verdict, be considered as having been alleged, or at least litigated by consent.

Question of Railroad Hazard.

As there was evidence tending to show that the crew of men engaged in repairing a railroad track were being hastened in order to prepare the track for an approaching train, it was for the jury to determine whether they were being subjected to the hazards peculiar to the use and operation of a railroad.

[1] Reported in 120 N. W. 300.

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Charge to Jury—Harmless Error.

The error in giving a general instruction, erroneous only because of the omission of a qualifying word, is cured by an accurate statement of the specific conditions under which the plaintiff may and may not recover.

Action in the district court for Freeborn county against defendant railway company and William Murtaugh to recover $1,500 damages for personal injuries. The case was tried before Kingsley, J., who denied a motion to dismiss the case at the close of plaintiff's testimony and denied a motion to direct a verdict for defendant railway company. The jury returned a verdict in favor of plaintiff for $1,000. From an order denying the motion of defendant corporation for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Morgan & Meighen and *Charles E. Vroman,* for appellant.

Plaintiff was injured by the act of a fellow servant and was not exposed to hazards peculiar to the operation of railroads. O'Niel v. Great Northern Ry. Co., 80 Minn. 27; Pearson v. Chicago, M. & St. P. Ry. Co., 47 Minn. 9; Dunn v. Chicago, 130 Iowa, 580. The ordinary work of the section gang, disconnected from any control of the train, is not within the meaning of the statute. Connors v. Chicago, 111 Iowa, 384; Hathaway v. Illinois, 92 Iowa, 337; Matson v. Chicago, 68 Iowa, 22.

Dunn & Carlson, for respondent.

Whether plaintiff was within the protection of the fellow servant act was a question for the jury. Tay v. Willmar & S. F. Ry. Co., 100 Minn. 131; Blomquist v. Great Northern Ry. Co., 65 Minn. 69. The haste with which it was necessary to do the work exposed plaintiff to railroad hazards.

ELLIOTT, J.

Thomas Christiansen, the respondent, recovered a verdict in a personal injury action against the Chicago, Milwaukee & St. Paul Railway Company and one of its employees, named William Murtaugh, and the defendant railway appealed from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

Christiansen and Murtaugh were members of a crew of workmen in the employ of the railway company, and were engaged in lining up and repairing the railway track, which was being largely reconstructed.

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While working with four other men, Christiansen was caused to fall on a crowbar, which he was holding under one of the rails, by the negligent act of Murtaugh in kicking a tie on which Christiansen was standing from under his feet. The appellant contends (1) that the pleadings were not broad enough to enable the plaintiff to recover for this negligent act of Murtaugh, and that the issue was not tried by consent; (2) that the plaintiff and Murtaugh were fellow servants; (3) that the trial court erred in instructing the jury (a) that it was negligence as a matter of law for Murtaugh to kick the tie out and cause it to roll from under the plaintiff's feet while he was at work and (b) that exposure to the hazards incident to the use and operation of a railroad would bring the plaintiff within the fellow-servant act, without limiting it to such hazards as are peculiar to the use and operation of a railroad; (4) that the plaintiff's counsel was guilty of misconduct.

1. It is conceded that the complaint states a cause of action, but it is claimed that it does not state a cause of action based on the negligent act of Murtaugh. The complaint alleged that the defendant "did negligently and carelessly furnish said plaintiff and said other employees with dangerous, defective, and improper tools and appliances with which to perform said work, and negligently failed and neglected to warn or instruct this plaintiff and said other servants of the hazards and dangers of the work." Then follows a general allegation: "And said defendants and both of them then and there otherwise so negligently, carelessly, and recklessly conducted themselves, and were guilty of such careless and negligent acts, omissions and conduct that by reason thereof and by reason of each and all the aforesaid negligent, reckless and careless acts and omissions of the defendants, and each and both of them, this plaintiff was suddenly caused to lose his footing and his feet were caused to be thrown from under him and he was suddenly and violently thrown and caused to fall," etc. See Clark v. Chicago, M. & St. P. Ry. Co., 28 Minn. 69, 9 N. W. 75; Dunnell, Pl. § 1640. The defendant was thus advised that the plaintiff claimed that he was injured by negligent acts other than those specifically enumerated. No motion to make the complaint more specific having been made, and the evidence as to the manner of the accident having been received without objection, the issue must be considered as having been litigated by consent. No

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question of the sufficiency of the pleadings was raised during the trial, and it cannot now be raised for the first time. Under the circumstances, this particular act of negligence must be considered as alleged by the complaint under the general charge which has been quoted.

2. The question whether Murtaugh and the plaintiff were, under the circumstances, entitled to the benefit of the fellow-servant laws was submitted to the jury, which found that they were not at the time fellow servants. Whether the statute applied depended upon whether the work in which they were engaged was such as to create the hazards peculiar to the operation of railroads. The cases on the application of the statute are reviewed in Jemming v. Great Northern Ry. Co., 96 Minn. 302, 104 N. W. 1079, 1 L. R. A. (N. S.) 696. In O'Niel v. Great Northern Ry. Co., 80 Minn. 27, 82 N. W. 1086, 51 L. R. A. 532, the injured man was a member of a surfacing gang engaged in work similar to that which these parties were doing. One of them was injured by being caught by an undrawn bolt in rolling timbers down from a trestle which was being dismantled. It was held that the men were not within the fellow-servant act, because the dangers of the work were no other or different in kind than in other employment. In Pearson v. Chicago, M. & St. P. Ry. Co., 47 Minn. 9, 49 N. W. 302, a crew of which the plaintiff was one was engaged in loading railroad iron from the ground upon a flat car when one of the crew negligently allowed one of the rails to fall upon the plaintiff's arm. As this work did not involve any of the peculiar hazards incident to the use and operation of railroads, it was held that the men were fellow servants, and not entitled to the benefit of the statute.

But it has been held that the fact that such work has to be done in great haste in order to get the track ready for, or to escape the danger from, an approaching train, makes it at least a question for the jury to determine whether the men were subjected to a railway hazard. Blomquist v. Great Northern Ry. Co., 65 Minn. 69, 67 N. W. 804; Anderson v. Great Northern Ry. Co., 74 Minn. 432, 77 N. W. 240; Kreuzer v. Great Northern Ry. Co., 83 Minn. 385, 86 N. W. 413. In Tay v. Willmar & S. F. Ry. Co., 100 Minn. 131, 110 N. W. 433, the court said: "The cases cited clearly indicate that no hard and fast rule or academic definition has been or can be formulated whereby it may be determined what is a railroad hazard and that each case must be

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adjudged upon its special facts; and, further, that the statute is to be treated as a remedial one for the benefit of railroad employees, and that it is only in exceptional cases that any railroad employee can be excluded from its benefits. Whether a particular case is within the statute is a question of fact for the jury if the facts are in dispute, or, if admitted, different minds might draw different conclusions from them. Tested by this rule, and following the cases to which we have referred, we hold that the admitted facts in this case do not show, as a matter of law, that the employment of the plaintiff when injured did not involve an element of hazard or condition of danger peculiar to the railroad business. The question was one of fact, and the trial court erred in not submitting the case to the jury."

The question of haste was in this case. The complaint alleged that "it was necessary to carry on and conduct said work with haste and expedition, because of the operation and movement of the trains, engines and cars upon said railroad track," etc. The plaintiff testified as follows:

"Q. You may go on and tell what he said to you men about what work you should do, how you should do it, and when. A. He said we should hurry up and line the track and get it in shape before the train came. Q. That was Mr. McKinsey, the boss? A. Yes. Q. Was there a train due about that time, or shortly after? A. Yes, sir. Q. And from which way was it expected? A. From the east. Q. And when he gave these instructions, did you go to lining the track? A. Yes, sir. Q. While you were lining the track, and up to the time you were injured, was there anything said by the straw boss about the work and how it should be done? A. Yes, sir. Q. What did he say? A. He said: 'Hurry up, boys.' Q. Did he say it once, or more than once? A. More than once. Q. Well, did you men act under instructions? A. We hurried up, all of us. Q. And at and prior to the time you were injured how were you working? A. Fast. Q. Uncommonly fast, or unusually fast? A. Unusually fast. Q. And what caused you to work unusually fast? A. He was hurrying up on us. Q. Why were you hurried up, and being hurried up? A. We expected the train to come. Q. And you were to line this track and get it into shape before the train came over it? A. Yes, sir."

The foreman testified that there was nothing to prevent the train

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from passing back and forth over the rails; but, if the plaintiff's testimony was true, it is evident that the men were hurried along and told that it was necessary to prepare for the coming of the train.

3. The jury were instructed that: The statute "has been held to apply only to those employees of a railroad company who are exposed to the hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers. * * * The first question for your consideration is this: Was the plaintiff in this case exposed to a hazard incident to the use and operation of the railroad and were the injuries which he received the result of such dangers?" It is contended that this is erroneous, because it was not confined to "the peculiar hazards incident to the operation of railroads." It is true that the statute applies only when the employee is subjected to hazards which are peculiarly and distinctly incident to the use and operation of railroads; but the omission of the restrictive word cannot have been prejudicial in this instance, because the court told the jury specifically that: "The test is this: Was he engaged in repairing a track upon which trains were operated, and, in view of that fact, did the work have to be done with great and unusual haste in order to avoid danger to trains that were or might be approaching? If his work was of that character, then he would be, within the rule which I have given you, exposed to the hazards incident to the use and operation of railroads. On the other hand, if he was not—that is to say, if the work upon which he was engaged did not have to be done with great and unusual haste in order to avoid danger to trains that were or might be approaching—then he was not exposed to the hazards incident to the use and operation of railroads."

4. The claim that the plaintiff's counsel was guilty of misconduct need not be considered, further than to suggest that Mr. Rockefeller had better be left out of these cases. His connection therewith is a trifle remote.

We find no errors which require a reversal, and the order of the trial court is therefore affirmed.

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EZRA N. MANORE v. KILGORE-PETELER COMPANY.[1]

March 12, 1909.

Nos. 15,954—(228).

Assumption of Risk.

Plaintiff, thirty five years of age, a foreman or straw boss of defendant, about to unload a flat car, complained to defendant's superintendent that the number of men provided him was not sufficient to do the work safely. The superintendent refused to furnish additional help. Plaintiff proceeded to the work, and safely unloaded all or practically all of one of two piles of timbers on the car. In unloading the second pile, one timber in falling struck the other timbers at the top of the other tier, whereby plaintiff was thrown from the car and injured. It did not appear that, if the method used in unloading the first pile had been used in unloading the second pile, the work could have been done safely. It is *held* that plaintiff's own conduct precluded his recovery of damages.

Action in the district court for Hennepin county to recover $10,250 damages for personal injuries. The case was tried before Frederick V. Brown, J., and a jury which returned a verdict in favor of plaintiff for $500. From a judgment entered pursuant to the verdict, defendant appealed. Reversed.

Brown, Albert & Guesmer, for appellant.

James R. Hickey, for respondent.

JAGGARD, J.

Plaintiff and respondent, a man thirty five years of age, for five months before the accident herein described had been yard foreman in the employ of defendant and appellant. At the time of the accident he was either a foreman or a straw boss over the man with whom he was working. Some days before the accident a freight car was switched into defendant's yards, loaded with timbers with square sides, which were 7x10 inches in dimension and from fifteen to sixteen feet long. They were piled on the car four high in tiers and two tiers to the car. Plaintiff with a crew of four men undertook to unload the car and move the unloaded timbers to a small truck, by which they were to be

[1] Reported in 120 N. W. 340.

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carried to the mill. Plaintiff, standing on the car, removed all or practically all of one tier of timbers. Defendant's employees working on the ground carried the timbers, by means of hooks attached to each end of the timber, to the truck. A man took hold of one of the two handles of each hook. Thus four men were required to carry each timber. Part of the second tier had been removed. While plaintiff was removing another timber on the freight car it swung out at one end across the car and caught two timbers on the next tier, causing them to tumble over, strike him on the heel, and throw him head first to the ground. The jury found for the plaintiff in the sum of $500. This appeal was taken from the judgment.

The gist of the negligence alleged was defendant's failure to provide sufficient and proper amount of help. The further allegation of negligence, of failure to provide a safe place, and of the giving of improper or wrongful orders to this plaintiff to proceed to do the work with the help furnished, does not in final analysis amount to additional or different negligence. Whether the giving of that order served to exonerate defendant [plaintiff] from the assumption of risk or contributory negligence will be subsequently referred to.

No question can arise that the failure of the master to employ a sufficient number of competent employees may constitute actionable negligence on his part. It is doubtful on this record whether such failure was shown to be a question of fact. It will, however, be assumed that this defendant was negligent in this respect. None the less we are of opinion that defendant [plaintiff] was precluded from recovering by his own conduct; for the defendant [plaintiff] himself testified that before the accident occurred he went to see "the superintendent about more men, * * * and he said he didn't have any more men to send out there at that time, and that he thought one man on a car was sufficient to throw those timbers off of a flat car." "Q. You wanted two men to handle the timbers because you thought that two men were necessary in order to make it safe and proper, and in order to make the work sufficiently easy and not too hard, isn't that the reason? A. I didn't care about the hard work, that is the reason." "Q. That is the reason, except you didn't care so much about the hard work? A. Yes. Q. In other words, you were willing—you didn't care so much about making it easy as you did for making it proper and safe? A.

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Yes." Plaintiff also testified that the superintendent did not promise to give him another man to assist him in the work and that he then "went back there and went to work."

The superintendent gave no assurance of safety, and said nothing likely to mislead plaintiff or to misrepresent the danger of the situation. It is clear that plaintiff knew the danger and appreciated the risk. He had complained of the insufficiency of the number of servants. He thought the actual number did not make the work safe and proper. None the less he undertook to do the work with the servants actually provided. He was a man of mature years and abundant experience in this general class of work. His counsel argues, however, that "this was the only time that plaintiff unloaded or assisted in unloading timbers of any kind from a flat car." The record shows that he had helped unload such timbers, and that he had bossed practically the same kind of a job as this. It is true that he did not remember having unloaded this kind of timber piled in this way on a flat car; but he had unloaded such timber from a box car and a gondola car. The gondola car was defined "as a flat car with sides coming up three or four feet, perhaps, all around; permanent sides, instead of sticks that can be removed." It is clear that plaintiff assumed the risk of the situation or was guilty of contributory negligence from this fact of the case alone. That conclusion appears, also, to be necessitated by the fact that plaintiff himself had removed all or most of the first tier of the first pile of timbers from this particular car by a method which proved to be safe. No explanation appears to have been made why he could not have removed the second tier with safety by the employment of the same method.

The adjudicated cases all throw little light on the subject. The conclusion agrees with the authorities of assumption of risk in unloading cases, which did not, however, involve the insufficiency of fellow servants. Galland v. Great Northern Ry. Co., 101 Minn. 540, 111 N. W. 1133; Boyer v. Eastern Ry. Co., 87 Minn. 367, 92 N. W. 326. Cf. Hagglund v. St. Hilaire L. Co., 97 Minn. 94, 106 N. W. 91. Smith v. St. Paul & D. R. Co., 51 Minn. 86, 52 N. W. 1068, is an authority in accordance with the conclusion here reached somewhat more specifically; and see Texas & P. Ry. Co. v. Rogers, 57 Fed. 378, 6 C. C. A. 403. It would be idle to cite authorities to the effect that a servant who

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knows and appreciates the danger of working with an insufficient number of fellow servants, of which fact he has actual knowledge, assumes the risk as a matter of law. No authorities appear opposed to this conclusion. Atlas v. National Biscuit Co., 100 Minn. 30, 110 N. W. 250, has no bearing on this controversy. That was a case where a minor was injured by unguarded machinery. Such a case is in a class by itself. De Greif v. Northwestern Knitting Co., 106 Minn. 15, 118 N. W. 558.

The judgment accordingly must be reversed, and judgment entered for the defendant notwithstanding the verdict. It is so ordered.

N. O. HAGE v. ST. PAUL LAND & MORTGAGE COMPANY and Others.[1]

March 12, 1909.

Nos. 15,986—(242).

Tax Sale—Statute Controlling.

Lands were sold for the delinquent taxes of 1896 to 1905, inclusive, in November, 1906, at forfeited tax sale, for an amount less than was authorized by law and not authorized by the state auditor. After the right of redemption had been eliminated by notice, a Governor's deed was executed. In an action to quiet title, involving the validity of that deed, it is *held* that the sale and subsequent proceedings under it were governed by sections 936 to 940, R. L. 1905, and not by chapter 2, p. 1, Laws 1902.

Deed Held Valid.

Under sections 938 and 940, R. L. 1905, the tax deed was valid as against the objections which were urged to it.

Action in the district court for Ramsey county to determine adverse claims to vacant and unoccupied land. William H. Houlton alone answered. The case was tried before Orr, J., who found in favor of plaintiff. From the judgment entered pursuant to the findings, the answering defendant appealed. Affirmed.

[1] Reported in 120 N. W. 298.

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John F. Fitzpatrick, for appellant.
Andrew J. Newgren and *William G. White,* for respondent.

JAGGARD, J.

In an action to quiet title to certain land, defendant was the owner of the fee, unless plaintiff's tax deed was valid. The trial court found for the plaintiff. This appeal was taken from the judgment.

The general taxes for the years 1896 to 1905, inclusive, were not paid. Separate judgments were duly entered against the premises for the taxes of these years. At the tax sales there were no bidders. The premises were thereupon bid in to the state. All the certificates were based on the tax sale of 1898 under judgment of the delinquent taxes of 1896. At the forfeited tax sale on November 14, 1906, the lands were sold by the county auditor separately to the plaintiff for $10.81 for every lot, being the amount of the delinquent taxes for 1896 to 1906, exclusive of interest, penalties, and costs. The amount of delinquent taxes against every lot on that date, inclusive of interest, penalties, and costs, was $18.55. The county auditor issued to the plaintiff separate certificates of absolute property sale for every one of said lots. Notices to eliminate right of redemption were given. No redemption was made. A deed to the property was executed to plaintiff by the Governor on June 24, 1907. The forfeited tax sale on November 14, 1906, was held under sections 936 and 937 of R. L. 1905, pursuant to a letter of instruction to said county auditor "that those tracts which were bid in by the state at the regular tax sale in 1901 and all years prior thereto, on which the aggregate taxes, penalties, interest, and costs exceed the cash value thereof, may be disposed of for a sum not less than the total taxes charged against said tract, excluding the penalties, costs, and interest." The court below found: "Neither the state auditor nor the county auditor of Ramsey county ever fixed or determined the value of the lots described in the complaint in this action, or any of them."

1. Defendant insists that sections 52–54, c. 2, pp. 28, 29, Laws 1902, which were re-enacted in the Revised Laws of 1905 as sections 936–938 were not applicable to lands bid in to the state at tax sales made prior to 1902, but that all such tax sales were regulated by prior laws, and that it was so held in Stein v. Hanson, 99 Minn. 387, 109 N. W. 821.

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If this be true, defendant's further position is well taken that the Governor's deed in pursuance of a tax certificate passed upon the sale to the state in 1898 for the taxes of 1896 was wholly unauthorized by law, and added nothing to plaintiff's right in this action under his tax certificates upon the sale to him. Defendant's argument, however, overlooks the important fact that section 52, c. 2, p. 28, Laws 1902, was not literally reproduced by section 936, R. L. 1905, but was substantially changed. Section 52 reads in part: "All pieces or parcels of real property bid in for the state *under the provisions of this act* shall be disposed of." The same part of section 936 provides: "*All parcels of land bid in for the state* and not assigned to purchasers or redeemed within three years from the date of the tax sale at which they were offered, shall become the absolute property of the state and be disposed of. * * *" (All italics are ours.) That is, the words "under the provisions of this act," which occur in section 52, do not appear in section 936. An inevitable effect of this change is that the Laws of 1902 had a prospective and not a retrospective operation, as was held in Stein v. Hanson, supra, and that section 938, which took effect on March 1, 1906, has both a retrospective and a prospective effect.

The forfeited sale was made in November, 1906, after the Revised Laws went into effect. It follows that, so far as this question is concerned, the Governor's deed was valid, as to this point, if the statute was constitutional. It is undoubtedly true that the primary rights of the owner of the fee are determined by the law in force at the time the adverse tax proceedings were taken, and that a legislature cannot by subsequent enactment of a law impair those rights. The question then is, what rights did the state acquire at the tax sale of May 7, 1898? Where a purchaser bought the land at that sale, and where he obtained a state assignment certificate, notice must have been given. No notice was, however, required to be given by the state as to lands which had been bid in to it and not assigned. The state could have sold to a purchaser and have given him an absolute deed. Jaggard (Minn.) Tax. 512. As was pointed out in the supplementary opinion in Minnesota Debenture Co. v. Scott, 106 Minn. 32, 40, 119 N. W. 391, 395, the land forfeited to the state was its own property. It had the right to determine on what conditions it would dispose of its estate. It made that determination by the revision of 1905 as will presently be set forth.

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That disposition could impair no rights to the property of the owner. His interest had been forfeited.

2. It remains to consider whether, under the provisions of the Revised Laws of 1905, the deed conferred title. It must be admitted that the tax sale was for an amount not authorized by law nor by the state auditor. The immediate question is whether these facts voided plaintiff's title. Section 938 provides that upon the expiration of the period of redemption fixed in accordance with the notice the Governor shall execute a deed, and that "every such deed shall vest the grantee with complete title to such lands, subject to the defenses that the tract or parcel was exempt from taxation, or that the taxes for which such tract or parcel was sold at said tax sale had been paid." The state had the right to fix the terms upon which the land should be sold and upon which the purchaser should obtain absolute title. By this section it excluded the right to object to the validity of its deed on the ground that the sale was for a less amount than was authorized by law or that it was made without instruction by the state auditor. It therefore concludes this controversy. Section 940 also necessitates this ruling.

Affirmed.

FRANK PFUDL v. F. J. ROMER SONS.[1]

March 12, 1909.

Nos. 16,014—(250).

Incompetency of Fellow Servant.

In an action to recover damages for personal injuries alleged to have been caused by the negligence of the employer in retaining in his employ a careless and incompetent fellow servant, it is *held* that in order to recover it was necessary for the plaintiff to prove that the servant was incompetent, that the defendant knew or ought to have known the fact, and yet retained him, and that the accident was caused by the particular incompetency alleged.

[1] Reported in 120 N. W. 302.

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Same—Evidence Admissible.

Prior specific acts of negligence on the part of the employee, of which the employer had notice or of which by the exercise of ordinary care he would have had notice, are admissible to prove the incompetency of the employee.

Assignments of Error.

Certain assignments of error, directed to the reception of evidence and instructions, considered.

Action in the district court for Ramsey county to recover $30,000 damages for personal injuries. The case was tried before Kelly, J., and a jury which rendered a verdict in favor of plaintiff for $9,000. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Price Wickersham, How, Butler & Mitchell, and *Durment & Moore,* for appellant.

T. P. McNamara, for respondent.

ELLIOTT, J.

The Hamm Brewing Company was erecting a brick building adjoining a brewery, and F. J. Romer Sons, a corporation, was in charge of the construction. An elevator was used to hoist material from the ground to the place where it was to be used, and the workmen also rode on it when necessary. The power for operating the elevator was furnished by a stationary engine, which was in charge of an employee named Benzel. The elevator was raised and lowered by a cable which passed around a drum on the engine. At one end of this drum was placed a dog, which, when in place, prevented the elevator from descending. When the dog was not in place, the engineer controlled the movements of the elevator by means of friction, which was regulated by a lever. On August 7, 1907, the engineer, Benzel, took Pfudl, one of the workmen, up on the elevator to the fifth floor, where he stepped from the elevator and placed a pail of water on a platform near by. Returning, he found the elevator still in place and stepped upon it, when it fell to the ground and he was severely injured. It appears that, while Pfudl was on the fifth floor, Benzel had left the engine without putting the dog in place. Both Pfudl and Benzel were in the employ of F. J. Romer Sons. In an action brought by Pfudl against

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F. J. Romer Sons the plaintiff recovered a verdict, and the defendant appealed from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

The plaintiff alleged that the defendant was negligent in that it had carelessly and negligently employed and kept in its service incompetent and insufficient fellow servants of the plaintiff and that by reason of such negligence the plaintiff was injured. On this appeal it is contended that the motion for judgment in favor of the defendant notwithstanding the verdict should have been granted, because the plaintiff failed to prove that the engineer was incompetent, or that the defendant, prior to the accident, had actual or constructive notice that he was incompetent. Numerous errors are also assigned, which the appellant contends required the trial court to grant a new trial.

There was no evidence to show that Benzel was not competent, so far as knowledge and ability to handle the elevator was concerned; but the evidence did tend to show that he was addicted to the use of intoxicating liquors to such an extent as to render him incompetent to properly perform his work, and that the defendant knew, or in the exercise of reasonable diligence should have known, that such was the fact. There was no evidence to show that the defendant was negligent in the original employment of the engineer. The appellant contends that the verdict should have been directed for the defendant, because the plaintiff failed to show that it ever had notice of the particular incompetency of Benzel, and thereafter retained him in its employ. The motion was properly denied, as under the evidence the question was clearly one for the jury.

The court properly instructed the jury that, before the plaintiff could recover, he must prove not only that Benzel was an incompetent servant as alleged, but also that the defendant knew, or ought to have known, before the accident, that he was incompetent, and yet retained him in its employ. 1 Labatt, Master & Servant, § 193a. The particular incompetency alleged was drunkenness, and it requires no argument to prove that a drunken man is incompetent to run an engine when the lives and limbs of other men are at stake.

The jury was instructed that they might determine whether there had been any previous acts of negligence on the part of Benzel which were due to intoxication. The appellant assigns this as error, because

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it gave the jury to understand that there was evidence in the case that tended to show that such was the fact. The court was justified in giving this instruction. The evidence tended to show that Benzel was in the habit of drinking every day, that he kept a pail of beer within reach while he was at work, that he had been in a more or less intoxicated condition while at work on the engine for a month or two prior to the accident, and that Mr. Romer, the president of the appellant company, saw him once or twice every day. Benzel had been guilty of other negligent acts in connection with the operation of the elevator, such as suddenly dropping a passenger down a few stories, or leaving the engine without the dog in place, as he did in this instance. The foreman had been advised by a workman that if he did not discharge Benzel he would kill some one by his manner of handling the elevator. Other witnesses testified as to Benzel's drinking habits, and one of the workmen said that it was common talk about the building. The incompetency of Benzel for the particular work was established by ample evidence (Consolidated v. Seniger, 179 Ill. 370, 53 N. E. 733; Williams v. Missouri, 109 Mo. 475, 18 S. W. 1098; Green v. Western, 30 Wash. 87, 70 Pac. 310; Young v. Milwaukee, 133 Wis. 9, 113 N. W. 59), and the jury was justified in inferring from all the evidence that what was so well known to the workmen was or should have been known to the president of the company who saw him every day. 1 Labatt, Master & Servant, p. 421; Hilts v. Chicago, 55 Mich. 437, 21 N. W. 878.

Error is assigned upon the refusal of the court to give an instruction to the effect that "the verdict must be for the defendant, unless a preponderance of the testimony shows (a) that the accident was due to the fact that the engineer, Benzel, was under the influence of intoxicating liquor; (b) that the defendant knew, or in the exercise of ordinary care ought to have known, that Benzel's habits were such that he might be so under the influence of liquor as to render him incompetent to properly operate the engine and elevator." We see no objection to this instruction; but the charge as given, when taken as a whole, expressed the same idea, and it was therefore not prejudicial error to refuse to give the instruction in this form. The jury must have understood that the plaintiff could not recover unless he showed that the act of Benzel was due to incompetency resulting from the use of liquor.

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The court sustained an objection to the following question asked Mr. Romer: "Did you ever have any knowledge or belief that he was not competent or fit to act as hoisting engineer on that engine?" The objection was properly sustained, as it was not a question of whether Romer believed Benzel was competent. The question was whether he was justified in so believing. 1 Labatt, Master & Servant, § 125. The witness was permitted to testify that he had no information as to Benzel's habits.

Error is also assigned upon the rulings of the court which permitted the plaintiff to show specific acts of drinking, drunkenness, and negligence on the part of Benzel. These acts were testified to by various workmen, who were in and about the place where Benzel was working. There is no direct evidence to show that Romer knew of the acts in question; but the circumstances were such that the jury was justified in finding that he was charged with notice as a matter of law. We are not required to determine whether specific acts of negligence of which the master had no knowledge are admissible generally to prove the incompetency of a servant. The authorities upon this question may be found collected and reviewed by Judge Sanborn in Southern Pacific Co. v. Hetzer, 135 Fed. 273, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288. See also 1 Labatt, Master & Servant, 411–414. It is conceded by all the authorities that prior specific acts of negligence, of which the master had notice, are admissible to prove the incompetency of the servant, and that a general reputation for incompetency is admissible to show that the master, by the exercise of ordinary care, would have known of such incompetency. The same reasoning requires that evidence of specific acts of negligence should be received when they are of such a character, or when they occurred under such circumstances and conditions that it may reasonably be inferred that they were known to the master, who is charged with notice of what, under the circumstances, he is required to know. The proof of facts of which the master is thus charged with notice is equivalent to the proof of facts of which he had actual knowledge. When the prior negligent acts are of this character, the evidence is competent, and the jury must determine whether under the circumstances the master was charged with notice. The evidence which was objected to in this case tended to show that Benzel was in the habit of drinking liquor to such an extent as to

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render him incompetent for the work in which he was engaged. It tended to establish the incompetent condition which results from such habits. The specific acts of negligence occurred in connection with the handling of this engine and elevator, and in view of the circumstances the jury was entitled to determine whether Romer should have known of the manner in which Benzel was doing the work.

The other questions which are discussed on this appeal do not require special consideration.

We find no error in the record, and the order of the trial court is affirmed.

ALICE CAMPBELL v. DULUTH & NORTHEASTERN RAILROAD COMPANY.[1]

March 19, 1909.

Nos. 15,834—(191).

Standard of Care.

The general standard of care fixed by the law is commensurate care, or due care under the circumstances.

Care for Safety of Passengers.

A railroad as a common carrier is required to exercise the highest degree of care, skill, and foresight for the safety of passengers consistent with the practical operation of its road.

Same.

The standard of care has due regard to the circumstances; that is to say, "in reference to every particular the highest degree of care which can be exercised in that particular, with a reasonable regard to the nature of the undertaking and the requirement of the business in all other respects," must be exercised.

Passengers on Mixed Train.

A common carrier of passengers on a freight or mixed train is required to exercise the highest degree of care consistent with the practical operation of such a train.

[1] Reported in 120 N. W. 375.

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Care Required on Logging Railway.

A carrier having limited fitness and capacity to transport passengers, and whose primary business is to transport its logs, is not held to the standard of perfection of an ideal road, but must exercise the highest degree of care practicable under the circumstances.

Admissible Evidence.

Evidence of care customary among well constructed and operated roads of the same class is admissible to show diligence, in an action brought by a passenger injured while riding in a freight train of a logging road.

Question for Jury.

In this case it is *held* that whether defendant was a general commercial railroad or a logging road was a question of fact for the jury.

Action in the district court for St. Louis county to recover $12,000 damages for personal injuries incurred while a passenger upon defendant's train. The case was tried before Ensign, J., and a jury which returned a verdict in favor of plaintiff for $2,000. From an order denying defendant's motion for a new trial, it appealed. Reversed and new trial granted.

H.Oldenburg and *Davis & Hollister,* for appellant.

John Jenswold, Jr., for respondent.

JAGGARD, J.

Plaintiff was injured while riding as a passenger in the caboose of the defendant's mixed train. She had a verdict. The first controversy in this appeal is whether the record contains any evidence tending to show that defendant was a so-called logging road, as distinguished from the ordinary commercial carriers. The question is not clear, because the controversy does not appear to have been satisfactorily litigated. Counsel for plaintiff himself, however, in his own questioning on trial, assumed that defendant was a logging road. In his brief on this appeal he asks: "Is it for this court to license the use of such track [as defendant's] when owned or operated by the company primarily for the purpose of carrying its lumber? Is a passenger on such a road to assume risks which he would not on other roads?" We have concluded that the record discloses enough to have made this a question of fact, to be tried by the jury.

The question then arises whether the court was in error in giving a charge which defined the duty of the defendant in the carriage of

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plaintiff to be that of the ordinary commercial carrier of passengers—"to exercise the highest degree of care, skill, and foresight for the safety of the plaintiff which was consistent with the practical operation of its means of transportation."

More specifically, the court charged that: "In the carriage of the plaintiff, she assumed such sudden jars and jolts as are common and unavoidable in the starting or running of mixed trains; but she did not assume any risk growing out of any negligence * * * resulting from *the unevenness of the track* or the failure to connect the air brakes on the entire train, nor did she assume the risk of injury by the negligence or want of care of the train crew in charge of the train, nor did she assume the risk of being injured by the breaking of the train in question." (The italics are ours.) The court charged, however, that when a passenger takes passage on a freight or mixed train he assumes all risk reasonably or necessarily incident to being carried by a method which he voluntarily chooses. It denied defendant's elaborate requests to charge, which, while not all verbally accurate or correct, were sufficient to direct the attention of the court before the jury retired to the question whether defendant was to be held to the standard of care by which the negligence of an ordinary commercial carrier of passengers is held.

It is clear on general principles, and it is the law in this state, that the test of care is not whether in degree it should be slight, ordinary, or extreme care, but commensurate care, due care under the circumstances. The adoption of this standard would logically result in the abolition of degrees of negligence. In a measure this has followed. With respect to carriers, however, the traditional standard appears to have survived. In case of ordinary railroads affording regular passenger service, soliciting such traffic, holding themselves out as able to take care of it, and running through passenger trains of great weight at tremendous speed, commensurate care is regarded as supreme or the highest practical care. The standard care, however, has proper regard to the circumstances; that is to say, in reference to every particular, the highest degree of care which can be exercised in that particular, with a reasonable regard to the nature of the undertaking and the requirements of the business in all other respects, must be exercised.

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Dodge v. Boston, 148 Mass. 207, 218, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. 541.

It is not accurate to say, as is often said, that certain classes of cases involve a relaxation in the degree of care exacted, or that they constitute exceptions to the general rule requiring supreme care. The degree of care is the same. Certain circumstances are recognized as differentiating the result of its exercise; that is, there are particular situations in which commensurate care does not require of certain carrier service the same tracks, equipment, and operation as is exacted of main trunk lines operating exclusively passenger trains. Thus a passenger on a freight or mixed train "assumes all risks reasonably and necessarily incident to being carried by the method which he voluntarily chooses. What the law does require is everything necessary to the security of passengers, consistent with the business of the carrier and the means of conveyance employed; the highest degree of care consistent with the practical operation of such train." Mitchell, J., in Oviatt v. Dakota C. Ry. Co., 43 Minn. 300, 303, 45 N. W. 436. And see Rosenbaum v. St. Paul & D. R. Co., 38 Minn. 173, 36 N. W. 447, 8 Am. St. 653; Schilling v. Winona & St. P. R. Co., 66 Minn. 252, 68 N. W. 1083; Simonds v. Minneapolis & St. L. R. Co., 87 Minn. 408, 92 N. W. 409; Chicago v. Arnol, 144 Ill. 261, 270, 33 N. E. 204, 19 L. R. A. 313; Railway Co. v. Sweet, 57 Ark. 287, 21 S. W. 587; Hall v. Murdock, 114 Mich. 233, 72 N. W. 150 (freight elevator). The trial court recognized this particular rule, but refused to apply the underlying principle to defendant's track.

The same principle also requires that the care to be exercised by carriers of passengers should have due reference to the nature of the road operated, the extent of its passenger traffic, its capacity and fitness to transport passengers, and to like considerations. Thus a person who, while a passenger on a train running upon a branch line of a railroad about ten miles in length, and consisting of freight cars and a combination car in which he is riding, one part of which is designed for passengers and another part for baggage, is injured by such jerking and jolting of the car as is ordinarily incident to a train of this kind, and who is familiar with the nature of the business on this line and the manner of conducting it, cannot maintain an action against the railroad corporation for his injury. Olds v. New York, 172 Mass.

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73, 51 N. E. 450. In I. & G. N. Ry. Co. v. Copeland, 60 Tex. 325, 330, it was said: "The liability of a railway company for negligence will, to a degree, be limited by its capacity and fitness to transport passengers, known to a passenger when he elects to be transported on it. Hence a short line road, doing a small business and running only mixed trains, is not required to apply all the delicate checks and guards that are in use." "Treating of the subject of the use of certain engines and machinery on short branch roads like the one under consideration, with comparatively a small amount of business, Mr. Wharton says: 'If I employ a carrier of small means and machinery, knowing what his capacity is, I must take him as I find him. * * * A railroad, doing a small business, in a sparsely populated territory, and running only a few trains, is not required to apply all the delicate checks and guards that are in use. * * * Diligence in all these cases is not the perfection of the ideal road. It is the practical adequacy of the actual road for the particular duty it undertakes.' Wharton on Neg. § 140." And see Shoemaker v. Kingsbury, 12 Wall. 369, 20 L. Ed. 432 (construction train); Wade v. Lutcher & M. C. L. Co., 74 Fed. 517, 20 C. C. A. 515, 33 L. R. A. 255 (in which a logging road was held to have been a private carrier).

The rule applicable to so-called logging roads, in the nature of things, depends largely upon the circumstances of each case. Ordinarily, logging roads in this state are subject to the jurisdiction of the railroad and warehouse commission. Their exact legal status does not, however, determine the criterion of the care which they are required to exercise. There are many such roads, whose business is primarily the carrying of the company's own logs. It is urged, however, that the profitable business of an ordinary commercial railroad is to carry freight. None the less the distinction between the two classes of roads, so far as exercising care is concerned, is obvious and founded in nature.

Logging roads carry in a caboose, or even in a passenger coach, their employees and the necessarily limited population of the territory through which they run. Their passenger business is small. Many persons are carried gratuitously. Such roads do not especially solicit passengers, nor do they prepare train schedules, or provide conventional passenger equipment. Usual arrangements for the convey-

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ance or convenience of passengers are generally absent. They do not ordinarily run through passenger trains, nor any trains with great speed, nor do they usually provide convenient way stations. Indeed, they often have not even terminal stations. The equipment bears no resemblance to that of a through trunk line. Their tracks are not intended for rapid transportation, are more or less temporary in structure, and in this country often pass over bogs which can be used only in the winter season, when the cold makes the roadbed solid. They are generally inferior in construction, irregular in course, heavy in grades, and sharp as to curves.

If the rule of law as to care to be exercised by common carriers of passengers were inflexible, and such logging roads were to be required to furnish the same tracks, trains, and equipment generally as are commercial roads, the result would be the judicial prohibition of enterprises of their nature. All that is required of such roads is the exercise of the highest care under the circumstances. The passenger must take such roads as he finds them. A carrier having limited fitness and capacity to transport passengers, and whose primary business is to transport its logs, is not held to the standard of perfection of an ideal road, but must exercise the highest degree of care practicable under the circumstances. The authorities involving the application of principles of facts most nearly similar tend, although not very clearly, to support this conclusion. Boisen v. Cobbs, 147 Mich. 429, 111 N. W. 82; Demko v. Carbon H. C. Co., 136 Fed. 162, 69 C. C. A. 74; Williams v. Northern L. Co. (C. C.) 113 Fed. 382; Harvey v. Deep River, 49 Ore. 583, 90 Pac. 501, 12 L. R. A. 131.

It follows that a new trial must be granted. In this view it is unnecessary to anticipate the course of that trial by a discussion of the other points raised, beyond saying that the defendant should have called to the attention of the trial court before the jury retired any improprieties in the charge of the court as to the extent to which a wife could recover for her decreased capacity to labor, and that evidence of customary care among well-equipped, well-operated roads of the same general character was admissible.

Reversed and new trial ordered.

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STATE ex rel. E. T. YOUNG v. VILLAGE OF GILBERT and Others.[1]

March 19, 1909.

Nos. 15,865—(22).

Powers of County Commissioners.

Under the provisions of section 700, et seq., R. L. 1905, the county commissioners are not vested with discretionary power to determine whether the unplatted portion of a village, proposed for incorporation, adjoins the platted part and is so conditioned as properly to be subject to village government.

Territory not Subject to Village Government.

The unplatted territory embraced within the limits of respondent village does not adjoin the platted portion and is not so conditioned as properly to be subject to village government.

Writ of quo warranto from this court to have the pretended incorporation of the village of Gilbert declared void and to have the pretended officers of the village show quo warranto they held their respective offices. The answer virtually admitted all the facts set forth in the information and alleged and relied on them as a justification for the incorporation. The answer alleged, inter alia, the territory included was three miles long by one mile wide for two miles of the length and one and one half miles wide for one mile of the length, that this territory comprised 56 forty acre tracts of land. The state demurred to the answer on the ground it did not state facts sufficient to constitute a defense to the information. Writ of ouster granted.

Edward T. Young, Attorney General, *George T. Simpson,* Attorney General, and *Washburn, Bailey & Mitchell,* for the State.

Baldwin, Baldwin & Dancer and *J. C. McGilvery,* for respondents.

[1] Reported in 120 N. W. 528.

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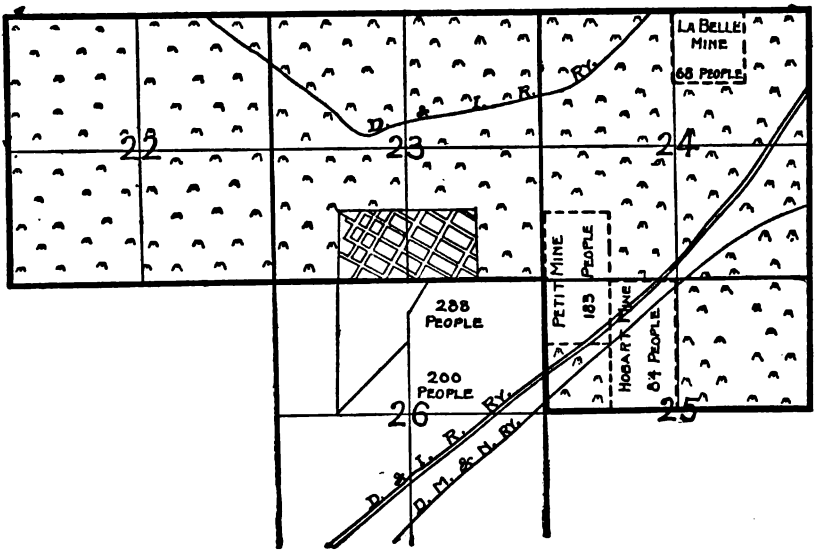

LEWIS, J.

This was a proceeding in quo warranto to test the validity of the incorporation of the village of Gilbert. The situation will be understood by reference to the accompanying plat. The territory includes 2,240 acres, located in the mining district of the Mesaba Range, St. Louis county. The entire tract, except as hereinafter stated, consists of wild, unimproved, cut-over lands, not specially suitable for agricultural purposes, and not inhabited. The platted portion consists of eighty acres, upon which ninety eight people resided. The Petit mine is located upon the southwest 40 of section 24, and the northwest 40 of section 25, in which locality one hundred eighty three people resided. The Hobart mine is located upon the east one half of the northwest quarter of section 25, upon which eighty four people resided. The La Belle mine consisted of the northwest quarter of the northeast quarter of section 24, upon which sixty eight people resided. There was another mine located upon the west half of the southeast quarter

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of section 24, but the pleadings do not disclose the number of inhabitants residing in that vicinity. On the forty acre tract in section 26, immediately south of and adjoining the platted portion, two hundred eighty eight people resided, and on the easterly portion of section 26 there resided two hundred people. Three lines of railway extend through portions of the territory, as noted on the map, which connect the several mines with the main lines from the range to Duluth.

The alleged attempt to incorporate the village was begun in the spring of 1908, and according to the answer a schoolhouse is being erected on the platted portion at a cost of $60,000, streets have been improved at an expense of about $4,500, and a lock-up built at a cost of $2,000. Streets have been laid out and graded, and sidewalks constructed. The village is a growing community, with stores and a telephone system; and an indebtedness of $6,000 has been incurred. It is stated in the answer that the territory in the northerly part of section 26 was not included as a part of the proposed village, for the reason that those residents were opposed to incorporation, and the voters residing thereon would have voted against the proposition. The answer also states that the reason why so large an extent of unimproved, wild, and cut-over lands is included is to better protect the village from forest fires and undesirable settlements in the vicinity; that the police protection, and the control of fires, peddlers, and school facilities for the whole community can be accomplished best with the nucleus on the platted portion as a center. Of those residing on the platted portion, who voted at the election to incorporate, sixty seven voted for incorporation and twenty seven voted against it.

The territory involved in this proceeding is not of so great extent as that involved in State v. Minnetonka Village, 57 Minn. 526, 59 N. W. 972, 25 L. R. A. 755, and State v. Village of Fridley Park, 61 Minn. 146, 63 N. W. 613. In amount of territory the case more nearly conforms to the territory involved in State v. Village of Holloway, 90 Minn. 271, 96 N. W. 40, but resembles the two former cases in that the proposed territory embraces several settlements having no natural connection and located at considerable distances from the platted portion.

The settlements around the several mines consist of miners and their families, and, although no stores are maintained at the mines, it is ap-

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parent that the general purposes for which villages are incorporated have no common relation between these clusters of people. Large tracts of undeveloped, wild, and uninhabited land intervene, and the territory, as a whole, does not constitute a village, within the definition so well expressed in State v. Minnetonka Village, supra: "A 'village' means an assemblage of houses, less than a town or city, but nevertheless urban or semiurban in its character; and the object of the law was to give these aggregations of people in a comparatively small territory greater powers of self-government and of enacting police regulations than are given to rural communities under the township laws. The law evidently contemplates, as a fundamental condition to a village organization, a compact center or nucleus of population on platted lands; and, in view of the expressed purposes of the act, it is also clear that by the term 'lands adjacent thereto' is meant only those lands lying so near and in such close proximity to the platted portion as to be suburban in their character, and to have some unity of interest with the platted portion in the maintenance of a village government. It was never designed that remote territory, having no natural connection with the village and no adaptability to village purposes, should be included." Here are several distinct mining settlements separated from each other, and from a half mile to a mile and a half from the village proper. It has not been made to appear how these separate communities can be brought together into one homogeneous people, and equitably and economically governed with respect to light, and police and fire protection, to say nothing of the benefits to be received by the distant settlements from the graded streets and sidewalks within the platted portion. As to these scattered communities, every element of "suburban character" and "unity of interest" is lacking.

But respondents insist that the statute, as amended, confers upon the county commissioners authority to determine whether the proposed unplatted territory adjoins the platted part and is "so conditioned as properly to be subject to village government," and that their decision is final.

Prior to the amendment the statute read: "Any district, sections, or parts of sections, not in any incorporation village, and in the state of Minnesota, which has been platted into lots and blocks, also the lands

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adjacent thereto, when said plat has been duly and legally certified according to the laws of this state, and filed in the office of the register of deeds for the county in which said lands or the larger portion thereof lie, said territory containing a resident population of not less than one hundred and seventy-five, may become incorporated as a village under this act in the following manner." Section 1200, G. S. 1894.

The amendment (section 700, R. L. 1905) reads: "Territory not already incorporated, which has been wholly or partly platted into lots, with a view to village occupancy, and which has a resident population of not more than three thousand nor less than two hundred, may be incorporated as a village in the manner hereinafter prescribed. But the unplatted part of such territory must adjoin the platted portion, and be so conditioned as properly to be subjected to village government." The amendment adopts the construction by this court of the previous statute, and emphasizes the principle that ouside unplatted territory cannot be included in a village unless it is so situated that it is naturally connected with and so situated as to be subject to village government.

As to the procedure, the following changes were made: Under the law in effect prior to the amendment, the statute (section 1201, G. S. 1894) provided that thirty or more of the electors then residents upon the lands to be incorporated might petition the county commissioners to appoint a time and place when and where the electors actually residing upon the lands should vote upon the question. The petition was to set forth the boundaries, the quantity of land therein embraced, and the number of persons actually residing in the territory, to be determined by a census to be taken under the direction of the petitioners; and section 1202 provided that the county commissioners, upon delivery to them of the petition, should post or cause to be posted in five of the most public places within the territory three copies of the petition, stating the time and place within the limits of the proposed village when and where the electors might vote for or against the incorporation, and the commissioners were required to appoint three inspectors to preside at the election. The law as amended (section 701) provides that twenty five voters residing within the territory must sign the petition. Section 702 reads as follows: "If the county board

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approve said petition, it shall cause a copy thereof, with a notice attached fixing a time and place for holding such election, to be posted in three public places within the boundaries described. The time shall be not less than twenty nor more than thirty days after such posting, and the place within the limits of the proposed village. If there be a qualified newspaper published within said limits, there shall also be two weeks 'published notice of such election.'" Under the old statute the commissioners were not vested with any discretionary power. It was simply made their duty, when a petition in the proper form was presented to them, to cause the notice of election to be given and appoint inspectors for the election. They did not even have the power to go back of the petition and determine the genuineness of the signatures, as is prescribed in proceedings for the removal of county seats.

But it is claimed that the legislature intended to make a radical departure, and that section 702 vests in the county commissioners discretionary power to pass upon the merits of the proposition and determine whether or not the territory set out in the petition adjoined the platted part, and was so conditioned as properly to be subject to village government. It is argued that, the commissioners in this case having considered the merits, having exercised their discretion, and determined that the outlying territory did adjoin the platted part and was so connected as to be subject to village government, their decision is final and not subject to review.

This occasion does not call for any extended consideration of the powers which may be delegated to bodies such as boards of county commissioners. It is a vexed question, concerning which there is a wide divergence of judicial opinion. It is the settled law of this state, so far as the incorporation of municipalities is concerned, that the legislature may designate such bodies as the instrumentality to submit to the voters the question of incorporation. But in our examination of this class of cases we have failed to discover any instance where such a body has been vested with judicial or quasi judicial powers sufficient to consider and finally determine the merits of the question. That the legislature intended to introduce so radical a change is not warranted by the language of the amendment. The significant words relied upon by respondents are: "If the county board approve said petition." What is meant by the word "approve"? Does it refer to the determi-

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nation of the reasonableness of the proposition to include the outlying territory, or does it merely mean that the commissioners shall determine from the face of the petition whether it contains the requisite number of residents and signers, and is in proper form? It is our opinion that the amendment imposes no new duties on the board of commissioners. It is simply another way of stating the same duty imposed by the former statute. Upon the admitted facts, the village was not incorporated in accordance with the law.

While the acting officers of the supposed village have gone on and incurred certain expenses for improvements, the relator has not been guilty of such delay in bringing this action as to call for the application of the principle of waiver or estoppel. There has been no express recognition of the village by the state, and the case is clearly distinguishable from St. Paul Gaslight Co. v. Village of Sandstone, 73 Minn. 225, 75 N. W. 1050, and State v. Village of Harris, 102 Minn. 340, 113 N. W. 887, 13 L. R. A. (N. S.) 533.

Let the writ of ouster be issued.

HENRY L. SIMONS v. EMIL MUNCH and Others.[1]

March 19, 1909.

Nos. 15,877—(180).

Adverse Possession—Maintenance of Dam.

Title[2] to lands by adverse possession may be acquired by the construction and maintenance of a dam across a stream, thereby causing the lands to be continuously submerged for the statutory period.

License to Construct Dam.

Public statutes, which authorize boards of county commissioners to grant licenses for the construction of dams across streams navigable for logs and lumber, are intended for the benefit and protection of the public, and do not have the effect of limiting the easement to that purpose, as to the owners of the submerged land.

[1] Reported in 120 N. W. 373, 121 N. W. 378.

[2] See pages 374, 375.

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Action in ejectment in the district court for Pine county to recover possession of lands submerged by defendants and for $2,000. The case was tried before Stolberg, J., who made findings and as conclusion of law found in favor of defendants. From an order denying plaintiff's motion for a new trial, he appealed. Reversed.

Clapp & Macartney, S. G. L. Roberts, and *J. W. Reynolds,* for appellant.

Charles Bechhoefer, Robert C. Saunders, L. H. McKusick, and *J. N. Searles,* for respondents.

LEWIS, J.

Action in ejectment to recover possession of lands submerged by the Chengwatuna dam on Snake river in Pine county. This dam was constructed prior to 1869 to create a head of water in Snake river for the purpose of improving the navigable character of the stream for logging and lumbering. For many years the dam was owned and maintained by Adolph Munch, and has been a prolific source of litigation.

The trial court found: "That the defendants, their predecessors and grantors, have been in the open, visible, hostile, notorious, and continuous possession of said dam for more than fifteen years prior to the commencement of this action, and defendants have been in such possession for more than thirty seven years prior to the commencement of this action, and such possession has been continuous, uninterrupted, and adverse, under claim of right on the part of said defendants, and their predecessors and grantors, and that said plaintiff, his ancestors, predecessors, and grantors, have not been seised or possessed of the premises in the complaint described as flooded within more than thirty seven years prior to the commencement of this action." The court further found that the lands described in the complaint had, during all of such periods, down to the year 1903, been continuously overflowed by reason of the construction and maintenance of the dam; that for some time prior to 1878 the water power created by the dam was used for running a sawmill and gristmill, and that in 1903 the dam was partially destroyed, and was rebuilt in 1904; that since 1903 the dam has not been used for the navigation of logs by the public generally, but only by respondent McGrath for his own private purpose of floating logs to the sawmill located on Cross lake, above the dam.

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It is claimed by appellant that the dam was originally constructed as a log sluicing dam, and was authorized under the statutes of 1853. However that may be, chapter 50, p. 173, Laws 1861, authorized boards of county commissioners to grant licenses for the construction and maintenance of dams across streams for the purpose of sluicing logs and lumber, and referred to a dam in Snake river, Pine county, fixing the toll for sluicing at ten cents per thousand feet. Whether the dam in question is the one referred to in that act does not definitely appear from the evidence; but the fact may be admitted for the purposes of this case. Appellant's position is that the owners of the dam acquired an easement in the stream for the single purpose of sluicing logs and lumber, and that when the dam was abandoned for that purpose in 1903 it must be deemed to have been abandoned for all purposes as to the owners of the submerged land. Appellant concedes the fact of continuous overflow of his lands ever since the dam was erected, but invokes the principle that, where an easement is acquired by prescription, the extent of the right is fixed and determined by the user in which it originated, and that the use of an easement by prescription is limited, both as to its character and its extent, by the use by which the right was established; or, as otherwise stated, where an easement in land has been acquired for a public use, and that use has been abandoned, the easement is at an end, and the owner is restored to his original rights in the land.

Such is the rule of law with reference to easements in general, but it has no application to the facts in this case. The misapprehension in the application of the principle arises from a misconception of the effect of the statute referred to. Enactments of that character are intended for the protection of the public, and have no reference to the relation and rights which may arise between the owner of the dam and riparian owners whose lands may be affected by the improvement. The statute required parties who chose to erect and maintain dams upon streams suitable for the navigation of logs to proceed in conformity with the act, in order that those having occasion to use the streams might be properly protected in their natural rights. Anderson v. Munch, 29 Minn. 414, 13 N. W. 192.

So far as the state was concerned, the owner of the bank was at liberty to construct and maintain the dam so long as it did not consti-

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tute an interference with the navigable rights of the public in the stream, and the state had no authority to authorize the construction of a dam across the river without providing for compensation to all parties who might be damaged thereby. It is the well-settled law of this country that the legislature cannot authorize the flooding of lands without compensation to the owner, and the right to flood land by extending a dam across such streams may be acquired by adverse possession for the statutory period. Swan v. Munch, 65 Minn. 500, 67 N. W. 1022, 35 L. R. A. 743, 60 Am. St. 491. A riparian owner has the right, without license from the county commissioners, to construct a dam which does not obstruct or interfere with the navigation of the stream. This is a right which is appurtenant to the ownership of the bank. Kretzschmar v. Meehan, 74 Minn. 211, 77 N. W. 41.

According to the findings of the trial court, appellant and his grantors stood by, without protest, for the period of thirty seven years. They were not justified in assuming that their rights as owners would be restored upon abandonment of the purpose for which the dam was maintained during all those years. Whatever may have occurred in 1903 with reference to a change in the use of the dam, has no bearing in this case, since long before that time the title to the premises involved passed from appellant's grantors.

Affirmed.

JAGGARD, J. (dissenting).

I dissent. In my opinion the evidence shows that the dam in question, so far as here involved, has always been a sluice dam, that the easement acquired was for a sluice dam only, and that its continuance is no longer justifiable. The submergence of the land in consequence of the very nature of the operation of a sluice dam was not continuous. It is elementary that the adverse claim of right must be supported by a consistent user. 9 Columbia L. Rev. 267. The authorities cited in plaintiff's brief sustain his position. See also Attorney General v. Great Northern, 1908, 99 L. T. (N. S.) 695.

On June 25, 1909, the following opinion was filed:

PER CURIAM.

Appellant claims the dam was originally constructed exclusively for the purpose of creating a head of water to sluice logs over the rapids

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below the dam; that the lands were flooded for that purpose only, that the dam was always maintained and used exclusively for that purpose until 1903; that the easement thus acquired was extinguished in 1903 by the cessation of log sluicing, the dam at that time having been diverted to new and different uses. The trial court found that the dam was constructed and used for the purpose of creating a head of water in Snake river and for the purpose of raising the volume of water in that stream to improve the navigable character thereof for logging and lumbering purposes, and upon motion to amend the findings, refused to find that the dam was constructed and maintained exclusively as a sluice dam.

According to the evidence, all logs cut on the stream above the dam prior to 1903 were destined to points on the St. Croix river, and were sluiced through the dam. Logging and lumbering was conducted, to some extent, all along the river prior to 1903, and for several years subsequent to 1903 lumbering was still conducted on the stream above the dam, but the logs were converted into lumber at mills above, and were not sluiced through the dam. The finding that the dam was created for the purpose of increasing the navigation of the river for logging and lumbering is not inconsistent with the claim of appellant that the main object was to sluice logs over the rapids below the dam. The evidence is meagre with reference to the use of the dam prior to 1903, but is not conclusive that the easement acquired was limited to the sluicing of logs. Although the dam was employed to run a saw mill and a corn cracker mill, that use was limited to a short time, not later than 1878. So far as we understand the case, the position contended for by appellant depends upon whether the general logging and lumbering carried on during the entire period before 1903 was a mere incident to the sluicing of logs, or whether such logging and lumbering can be regarded as an independent business with reference to which the dam was erected and maintained. The findings are somewhat indefinite and should have been made more specific on plaintiff's motion, and we have come to the conclusion that a new trial should be granted in order that the entire subject may again be presented to the trial court.

Attention has been called to certain language in the syllabus, and in the closing part of the opinion, which might indicate that it was the

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view of the court that title to the fee of the lands was acquired by adverse possession. Such was not the intention, although the language used may be subject to that inference. It is only necessary to state that the word "title," as there used, refers not to the fee but to the right acquired to maintain the dam.

New trial granted.

ANDREW P. HANSON v. OLE K. HELLIE.[1]

March 19, 1909.

Nos. 15,938—(227).

Instruction Justified by Pleadings.

To determine the value of what respondent parted with in a real estate trade, the trial court instructed the jury to find the difference between the value of the property and the incumbrance thereon—a building association contract. *Held*, the issue made by the pleadings justified the court in so instructing.

Same—Failure to Make Request.

But, conceding that, under the pleadings and evidence, appellant was entitled to have the jury consider the peculiar character of the incumbrance in determining the value of the premises, the court did not err in omitting so to instruct, in the absence of a request to that effect.

Action in the district court for Freeborn county to recover $1,935 damages for alleged fraud in the real estate transaction described in the opinion. The case was tried before Kingsley, J., and a jury which rendered a verdict in favor of plaintiff for $1,659.83. From an order denying defendant's motion for a new trial, he appealed. Affirmed.

Morgan & Meighen, for appellant.

Dunn & Carlson and *P. C. Cornish,* for respondent.

LEWIS, J.

Respondent and appellant entered into a certain contract in writing, whereby respondent agreed to purchase from appellant three hundred eighty seven acres of land in the state of Kansas at the purchase price

[1] Reported in 120 N. W. 341.

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of $3,483, to be paid as follows: $400 in four equal instalments, and to convey to appellant by warranty deed certain premises in the village of Alden "clear of all incumbrances, with the exception of a $900 mortgage to the Wells Building & Loan Association, which must be assumed by the said Ole K. Hellie." The Kansas land was held by appellant under a contract from the Union Pacific Land Company, and respondent agreed to assume and pay the deferred payments under that contract. Respondent executed and delivered the deed to the Alden property, and this action was commenced for the purpose of recovering the amount which he claimed to have been damaged by reason of fraudulent representations of appellant as to the value of the Kansas land.

By proper instructions the trial court submitted to the jury the question whether the fraud alleged had been perpetrated by appellant, and with reference to the measure of damages the court stated that it was admitted that respondent conveyed the Alden property, subject to a $900 mortgage to the Wells Building & Loan Association, and that he parted with $400 in notes and the difference between the value of the Alden property and the amount of the incumbrance of $900; that respondent was entitled to recover the difference between what he parted with and what he received. The court also directed the jury to determine the value of the property which respondent received; that, if the Kansas property was worth more than the amount of the unpaid purchase price at the time the contract was made ($1,393.52), such excess represented the amount which respondent received; but, if the land was worth less than the amount of the unpaid purchase price, then respondent did not receive property of any value.

Respondent recovered a verdict, and appellant takes exception to the instructions, because the court assumed that the incumbrance against the Alden property made the value of the equity which respondent parted with to be just $900 less than the value of the premises, whereas the court should have instructed the jury to take into consideration the nature of the incumbrance in determining the value of the property. The incumbrance consisted of a building and loan association contract, which drew interest at the rate of ten per cent. payable in monthly instalments running several years, and it is assumed by appellant that the value of the premises was necessarily affected by a burdensome incumbrance. Appellant's position is without merit: (1) Because at the

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time appellant consummated the trade he was notified of the nature of the incumbrance, knew that it was a building and loan association mortgage, contracted with respondent upon the basis of a $900 incumbrance, and assumed its payment. This was all admitted by the answer, and the question now urged is foreclosed. (2) Conceding, however, that appellant was not bound by his contract and by the pleadings, he cannot complain of the instructions, because no objection was made at the time, and the attention of the court was not called to the question now presented. What we have said also applies to the instruction of the court with reference to finding the value of the Kansas property.

The testimony on behalf of appellant, with the exception of that offered by him personally, as to the value of the Alden property, ranged from $1,500 to $1,800, and in instructing the jury the court referred to these amounts, without making special reference to appellant's testimony that the property was not worth more than the incumbrance. There was no prejudice in this, inasmuch as the court told the jury to take into consideration all the evidence in determining the value.

The criticism that on several occasions the court instructed the jury to return a verdict for respondent is not well taken. The first part of the charge dealt with the question of fraud, and the second part with the question of damages. The clear import of the entire charge was that, if respondent was entitled to recover anything, he should recover the difference in value between what he parted with and what he received.

No errors. Affirmed.

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ORRIN KINNEY v. EMIL MUNCH and Others.[1]

March 19, 1909.

Nos. 15,984—(223).

Adverse Possession—School Land.

Title to school lands cannot be acquired by adverse possession as against the state. Murtaugh v. Chicago, M. & St. P. Ry. Co., 102 Minn. 52; Scofield v. Scheaffer, 104 Minn. 123.

Ejectment—Defense.

A purchaser from the state of school lands which have been submerged by the maintenance of a dam across a stream may maintain an action for the possession thereof, and the parties maintaining the dam are not entitled to set up as a defense the right of a village, located upon the flowage, to prevent the dam from being abated.

Action in the district court for Pine county to recover possession of certain land; to compel the abatement of a certain dam, the existence of which caused an overflow upon plaintiff's land and for $2,440 damages. The case was tried before Stolberg, J., who found in favor of defendants. From an order denying plaintiff's motion to amend the findings, and from an order denying his motion for a new trial, he appealed. Reversed and new trial granted.

J. W. Reynolds, for appellant.

J. N. Searles, for respondents.

LEWIS, J.

This action was brought for the purpose of recovering possession of certain lands submerged by the maintenance of the Chengwatuna dam across Snake river in Pine county, and to recover damages for the use and occupation of the premises. The decision in Simons v. Munch, supra, page 370, 120 N. W. 373, controls all questions here involved, with this exception: In that case the title to the submerged lands rested in private parties. In this case the submerged tract consisted of schools lands, and appellant acquired title October 24, 1902, by purchase from the state.

[1] Reported in 120 N. W. 874.

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Title to lands granted to the state for the use of its schools by the United States cannot be acquired by adverse possession as against the state. Murtaugh v. Chicago, M. & St. P. Ry. Co., 102 Minn. 52, 112 N. W. 860, 120 Am. St. 609; Scofield v. Scheaffer, 104 Minn. 123, 116 N. W. 210. If this title had not been acquired by respondents as against the state at the time of the sale, it follows that no title was acquired as against appellant at the time of the commencement of this action. Respondents urge, however, that while the state was the owner of the lands it granted to the village of Pine City the right to regulate by ordinance the head of waters to be maintained in this dam. Chapter 38, p. 228, Sp. Laws 1881; chapter 16, p. 118, Sp. Laws 1885; chapter 70, p. 652, Sp. Laws 1887; Village of Pine City v. Munch, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763.

The court found that on June 20, 1885, the village council duly passed an ordinance fixing the minimum of water at the dam in Snake river, and provided a penalty by fine or imprisonment for any one who should open the gates of the dam while the water was at a depth of seven feet or less. It is argued that, having authorized the village to enact the ordinance for the protection of its inhabitants, the state would not be permitted to abate the dam to the injury of the village, and that appellant purchased the land from the state with notice of the rights of the village.

It is the general rule that in an action of ejectment, one who is in possession of premises under color of title or right may avail himself of an outstanding title as a defense. But that defense is not available where the party in possession is an intruder or trespasser. Tyler, Ejectment & Adverse Enjoyment, p. 564; Brolaskey v. McClain, 61 Pa. St. 146; Anderson v. Gray, 134 Ill. 550, 25 N. E. 843, 23 Am. St. 696; Sullivan v. Eddy, 164 Ill. 391, 45 N. E. 837; Stephenson v. Reeves, 92 Ala. 582, 8 South. 695; Guilmartin v. Wood, 76 Ala. 204; Williams v. Swetland, 10 Iowa, 51. In Village of Pine City v. Munch, supra, the rights of the village were limited to the regulation of the flowage, and the expressions of the court with reference to the rights of the village to prevent the abatement of the dam were carefully guarded. As decided in Simons v. Munch, possession of the submerged lands was not authorized by the statute, so in this case respondents did not take possession of the premises in question under

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color of right or title, and in view of the somewhat doubtful rights of the village to abate the dam this is not a case for the application of the rule referred to. Whatever remedy the village may have had as against the state while the title stood in the state, or may have as against appellant, is not open for consideration on this appeal, because the village is not a party.

For these reasons, the court was in error in ordering judgment for respondents, and a new trial is granted.

GEORGE W. HOLLAND v. ROBERT H. NETTERBERG and Others.[1]

March 26, 1909.

Nos. 15,857—(140).

Patent Conclusive Evidence of Title.

In 1881 defendants' ancestor received certificates of sale of school lands. In 1882 he assigned the certificates, by indorsement in which the wife did not join, to persons who assigned them to plaintiff's grantor. A patent was issued to her in 1890 upon payment of the balance due the state. In 1906 she and her husband conveyed to the plaintiff. The original purchaser died intestate in 1883. His wife survived until 1898. The premises at all times have been vacant and unoccupied. Timber was cut, but no permanent structure was built thereon. Taxes were paid by plaintiff, or by persons through whom plaintiff claimed. In an action to determine adverse claims it is *held* a patent regular on its face, in proper form, signed by the proper officers, with the proper seal, is conclusive evidence of regular title. Accordingly one who has a prior equitable right to receive patent superior to that of the patentee may enforce his equity by action, or, when he is defendant, by answer, in which the court may cause regular title to be vested in him and may adjudge possession to him. McKinney v. Bode, 33 Minn. 450, followed and applied.

Same—Prima Facie Effect not Avoided.

Defendants proved no facts sufficient to entitle them to avoid the prima facie effect of the patent.

[1] Reported in 120 N. W. 527.

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Action in the district court for Crow Wing county to determine adverse claims to certain land. Defendants' demurrers to the reply and amended reply were overruled, and the case was submitted on the pleadings and stipulated facts before McClenahan, J., who found that plaintiff was the sole owner in fee of the land described. From the judgment entered pursuant to the findings, defendants appealed. Affirmed.

Charles N. Dohs and *B. H. Schriber,* for appellants.

Alderman & Mantor and *Leon E. Lum,* for respondent.

JAGGARD, J.

In 1881 the ancestor of the defendants bid in two quarter sections of school land in this state. In 1881 he received the regular certificates of sale therefor, for which he paid $30 in one quarter and $33 in the other, and gave his obligation to the state for the payment of the balance. At this time he was married. The defendants are the children and heirs and their respective husbands and wives. In 1882 he assigned by indorsement one certificate to one Jackson, and the other to one Congdon. His wife did not sign either of these assignments. The certificates, with the assignments, were recorded in 1888. The assignee entered the land, cut the timber, paid taxes, and in 1883 assigned the certificates to Hubbard and Hayward, who in 1889 or 1890 assigned them to Della M. Hayward. A patent was issued to her by the state in 1890 upon the payment of the balance due. In 1906 she and her husband conveyed to the plaintiff. The original purchaser died intestate, a resident of Minnesota, in 1883. His wife survived until 1898, when she died, a resident of this state and intestate. The premises at all times have been vacant and unoccupied. Timber was cut, but no permanent structure was built thereon. The land was not fenced until plaintiff fenced it after the commencement of this action. On an agreed statement of facts the court ordered judgment for plaintiff in this action—that plaintiff was the sole owner in fee simple of the land. On the part of defendants this appeal was taken from the judgment entered therein.

Defendants' argument is: (1) That the wife, on her husband's death, had a vested right to an undivided one-third interest in the land; (2) that the issuance of the patent did not affect such right; (3) that on the husband's death the wife and plaintiff's grantors became tenants

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in common, and that upon her death defendants, as her heirs at law, succeeded to her title and status; (4) and that this interest has never been divested, nor this status destroyed.

The second proposition is unsound. The whole argument fails with it. It ignores the natural and necessary legal effect of the issuance of a patent. The only authority cited to sustain it is McKinney v. Bode, 32 Minn. 228, 20 N. W. 94, involving an action of ejectment. Many considerations serve to differentiate it. It suffices for present purposes to call attention to the circumstances that the assignment of the certificate of purchase of school lands to one Angus, to whom the patent was issued, was void as a contract between the husband and wife relative to the real estate, and that the defendant was in no wise connected with the patent. Indeed, the subsequent history of this very case demonstrates the unsoundness of defendant's proposition; for Bode, the defendant in the case cited, after the first trial in ejectment acquired the patent title for Angus. Accordingly, on the second trial, the defendant prevailed through the patent title. See 33 Minn. 450, 23 N. W. 851. Gilfillan, C. J., there announced what is now the settled rule in this state, viz., that a patent regular on its face, in proper form, signed by the proper officers, with the proper seal, is conclusive evidence of regular title, and that accordingly one who holds it has a prior equitable right, and that accordingly one who has a prior equitable right to receive the patent superior to that of the patentee may enforce his equity by action, or, when he is defendant, by answer, in which the court may cause the legal title to be vested in him and may adjudge the possession to him. McKinney v. Bode, 33 Minn. 450, 23 N. W. 851.

This rule is entirely consistent with the decision in Haaven v. Hoaas, 60 Minn. 313, 62 N. W. 110, to which, in particular, defendants refer us. That case concerned the rights of the certificate holder, not as against a person to whom, as a purported assignee of the certificate, a patent had been issued, but as against another person claiming under a resulting trust which the statute had abolished.

Defendants insist in their brief that "this action is essentially an action at law, entirely statutory and in rem." Defendants did not assert an equitable title in their answer. On the contrary, they pleaded on the theory that defendants were the legal owners of the undivided one-third tract of the land described in the complaint. The issue of

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equitable relief is, therefore, not before the court. Stuart v. Lowry, 49 Minn. 91, 51 N. W. 662; Freeman v. Brewster, 70 Minn. 203, 72 N. W. 1068. The conclusion of the trial court must therefore be sustained. Moreover, the defendants' ancestor, from 1882 until her death in 1898, made no objection to the payment of the balance due the state, nor to the use of the premises, nor to the patent issued in 1890, but abandoned the premises as completely as was possible. Nor have the heirs asserted any claim since then until after this action was commenced. Within the rule laid down in Murphy v. Burke, 47 Minn. 99, 49 N. W. 387, this constituted an abandonment. Defendants' equity was not superior to plaintiff's. McKinney v. Bode, 33 Minn. 450, 23 N. W. 851. The authorities to which defendants refer us, which concern cotenants, are not in point.

Order affirmed.

STANLEY A. TWITCHELL v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.[1]

March 26, 1909.

Nos. 15,862—(143).

Railroad Frog—Defendant's Duty to Tricycle Rider.

Plaintiff applied to defendant for a motor velocipede. Defendant furnished a tricycle, propelled by hand and provided with a brake. Plaintiff attached a gasolene engine, in the use and construction of which he was an expert. With defendant's consent and approval he used this motor tricycle. While plaintiff was driving it in the course of his employment, it was derailed at a frog, and plaintiff injured. The claim as to defendant's negligence was that the point of the frog was out of alignment with the rail. There was proof of some lack of alignment. The frog was of the rigid or clamp type, and in the identical condition in which it was at the time of the accident had been used for two years daily by freight and passenger coaches and by locomotive engines, and at times by handcars, without accident or trouble. The guard rail was properly placed. It is *held* that defendant's primary duty as to the frog was to furnish and maintain it so as to safely carry freight and passengers in the performance of its duty as a common carrier; that defendant's duty to plaintiff did not require it to provide a frog so mechanically perfect and in so precise alignment with its track that plaintiff could safe-

[1] Reported in 120 N. W. 531.

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ly run his light machine, with its wheels of small diameter, thin flanges, and narrow tread, at such a rate of speed that the small guide wheel in front would climb the rail and the machine then run fifteen feet with such force that, when it encountered a tie or other obstacle, its front axle would be broken.

Action in the district court for Hennepin county to recover $7,500 damages for personal injuries. The case was tried before Dickinson, J., and a jury which rendered a verdict in favor of plaintiff for $2,100. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Reversed and judgment ordered for defendant notwithstanding the verdict.

John L. Erdall and *A. H. Bright,* for appellant.

Larrabee & Davies, for respondent.

JAGGARD, J.

Plaintiff and respondent, a gasolene expert, was employed by defendant and appellant as a pump repairer. His duties extended over one hundred twenty miles of defendant's track. He applied for a gasolene engine velocipede. He was furnished a tricycle propelled by hand and provided with a brake. He procured a gasolene engine himself and attached it. He used the motor tricycle thus constructed with the knowledge and approval of defendant. According to his own testimony, he was operating the car at a rate of six to eight miles per hour. The guide wheel struck the point of the frog, climbed the rail, the car was turned sideways, ran about fifteen feet, as plaintiff testified, "and struck a tie—I supposed it was a tie—struck some obstacle, and turned over and let the body of the car rest on my leg. The vibration of the car after striking shook my foot off the foot rest. The front axle broke, letting the car drop onto my leg. (The car had) slewed around, and let the front wheel go to one side of the track and the rear wheel was between the rails." Plaintiff sat about one-half the way between the forward and rear wheels on the right side. His left leg was broken. For injury thus inflicted, recovery was sought in this action.

In greater detail, the tricycle which plaintiff used was materially different in construction from the ordinary hand car and from the ordinary freight or passenger car. The frame was much slighter and far less rigid. To remedy this defect plaintiff took an iron brace and

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fixed it to a wooden brace brought to the top of the sill. He put a brace from the guide wheel over to the sill, and then connected with the brace that extended on to the shaft over the frame to the guide wheel. The three wheels of the tricycle were narrower as to tread, thinner as to flanges, and smaller as to diameter than ordinary car wheels. The guide wheel was smaller than the two parallel wheels of the velocipede. The weight of the tricycle itself was one hundred fifty pounds, and with the engine three hundred twenty five pounds.

The record contains some confusion as to the points of the compass involved. According to a photograph, used by one of the parties without criticism, the directions were as follows: The switch in question was placed where the side track left the main track to the west, so that the heel or toe of the frog was to the south, and the point of the frog faced north. The wing of the westerly rail of the main track angled towards the west, and ended at a point between the rails of the spur track, and will be referred to as the "outer wing." The wing of the easterly rail of the spur track angled towards the east, between the rails of the main track, and will be referred to as the "inner wing." The throat or mouth of the frog was to the north of the point. The guard rail of the main line was to the east, opposite the frog. The guard rail of the side track was to the west, and opposite the frog. The frog itself was of the type known as a "clamp," or "rigid" frog. It was about eight feet in length. The distance between the point of this particular frog and the outer wing rail was two or two and a fourth inches. The distance between the point of the frog and the inner wing rail was two or two and a half inches. The distance between the point of the frog and its throat or mouth—that is, where the wing rails angled from the main and side tracks, respectively—was about three inches. The distance between each guard rail and the track rail, respectively, was the standard, namely, two inches.

Plaintiff's claim as to negligence on the part of the defendant was that the point of the frog at which the accident happened was five-eighths of an inch out of alignment with the westerly rail of the main track. He was going south. The contention is that the guide wheel, by virtue of this lack of alignment, instead of running smoothly over the point of the frog, struck it, and was caused to climb the rail. In support of this allegation, plaintiff introduced some direct testimony

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that on visual inspection the lack of alignment appeared. In large part, however, his evidence on this point consisted of an experiment made by starting a string from a point south of the frog, running it in a northerly direction along the easterly ball of the west rail, past and in contact with the point, and thence to a point on the easterly ball of the same rail beyond the frog. The exact place at which the string came in contact with the main rail north of the point was not fixed. The photographs in evidence show that this was a considerable distance beyond the northerly end of the rail which was a part of the clamp switch. It appears, also, to have been about opposite the northerly end of the guide rails. One end of the string was fastened about three and a half feet from the point of the frog, south of the point. Whether the main track at the end beyond this point ran on a straight line or on a curve did not affirmatively appear. At the throat or mouth of the frog, and for some distance beyond and to the north, the photographs show that the string did not come in contact with the westerly rail of the track. The oral testimony was that this distance was five-eighths of an inch. There was also testimony that the rail at this point was "kind of rusty."

Plaintiff's theory was that "the frog originally was built for a different angle, that is, the rails were supposed to cross at more of an angle than they do cross. * * * In putting that frog in, they didn't have that rail run out broad enough angle, so they swung the whole frog, which is about eight feet long. It was swung out so as to line up with the siding rail, and they tried to split the difference, so it would line up. They tried to split the difference, so it would line up, and that point was out of line. And on the siding the cars had been shoved on the siding so that it wore the point down like a knife edge; so it stuck out just like a knife edge. * * * The edge of the main line did not seem to be worn as much. Q. And yet you say that projected in about five-eighths of an inch? A. The reason I would say for that is because of the cars going on the siding of the curve. It forced them on a curve. Q. Well, when the wheel passes over the main rail and strikes the point of the frog, the wheel must necessarily strike the point of the frog on the inside? * * * I found very little if any wear there."

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On defendant's part there was direct evidence that the frog was regularly inspected and found to conform to standard requirements. After the accident a rigid road gauge was used to test the alignment, and showed that the track was essentially in perfect condition. Part of defendant's case was that the relative space of the rails after the frog was once put together could not be changed, because the parts were held rigid by the cast-iron blocks which appeared in the photographs. For at least two years the frog had been exactly in the same condition. During that time a mixed train, consisting of an engine and tank, some freight cars, and a passenger coach, ran over this frog going in one direction, and on its return going in the other direction, every day. Extra trains ran over it on an average every other day. More or less switching was done over it in connection with such trains. A hand car was run over it oftener than once every other day, and at times a hand velocipede was run over it. No accident, except the one in question, ever occurred at this frog, and no difficulty of any kind was ever experienced in connection with its use, either before or after the accident.

The jury returned a verdict for plaintiff in the sum of $2,100. This appeal was taken from the order of the trial court denying defendant's usual motion in the alternative.

The initial question is whether the plaintiff had borne the burden of showing actionable negligence on defendant's part. From the happening of the accident, no inference that such negligence existed is to be drawn. The question is whether the facts show a breach of duty by defendant to the plaintiff. The primary purpose of defendant's track was to haul and switch ordinary cars. That the frog and track was sufficient for the purpose, and that defendant exercised due care with reference to this use, is conclusively shown by undisputed testimony. Assuming that plaintiff has shown imperfect alignment between the point of the frog and the westerly rail of the main track at the throat, it appears as a matter of law that for ordinary use of the track this lack of alignment was a negligible quantity. The reason is apparent. Immediately opposite the frog in question was a guard rail, next to the easterly main track at the standard distance, or at such a distance as enabled it to correctly perform its proper function. In consequence, when an ordinary car approached the frog in either direction, the guard rail controlled its motion. The inside wheels would come in

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contact with the easterly ball of the guard rail and be safely conducted on the main track until past the frog. When cars were sent over the side track exactly the corresponding thing happened. The significant circumstance is that the direction which the wheels would take was determined, not by the exact alignment of the point of the frog with the rails at its throat, but by the guard rail. It was absolutely necessary that at the frog there should be a considerable space between the point of the frog and its throat; otherwise, a crossing would be impossible. If this distance were great enough to allow the wheel to sag or drop down before it struck the frog, the danger would be obvious. No such distance is shown in this case, so far as it concerned the wheels of ordinary cars. The experience in the use of the frog demonstrates beyond question that the distance aforesaid was not excessive, and was adequate to permit the safe use of the side track.

The record may fairly be regarded as containing enough to have justified the jury in finding some lack of alignment between the point of the frog and the westerly rail of the main track north of that point; but, on consideration of both defendant's proof and plaintiff's own testimony and experiment, it could not be fairly found that such divergence was great. Defendant's testimony in large measure eliminated the personal factor of the witnesses, and is strongly persuasive of a proper alignment of the track, because it rested largely upon facts shown to exist in nature. Especial significance is to be attached to the employment of the rigid gauge, to the continued and safe use of the tracks, which remained unchanged after the regular inspection, and to the fact that the frog itself was rigid. How it was possible for that frog to have been "slewed around," as plaintiff contends, is not made clear. Plaintiff himself testified that he could discover no perceptible wear on the inside of the track. How a projection so great as plaintiff claims to have found is to be reconciled with this fact has not been shown to us. His verbal testimony involved the factors of individual error and conjecture. His experiments were in a measure inconclusive, because of the flexibility of the string used on the ball of the rail, and because of the absence of definiteness as to the place it came in contact with the rail north of the point and as to the line of the track at the northerly point of contact. We are not inclined, however, to place any considerable stress on these criticisms.

On the assumption that some lack of alignment was shown, and that

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the accident happened at this point, it is quite clear that the difference between the structure of an ordinary car and of the velocipede was the necessary condition of the accident. The strong axle to which the wheels of an ordinary car are rigidly attached was shown to have been sufficient to have compelled the guard rail to perform its function. When, however, the smaller guide wheel, with its thin flange and narrow tread, reached the open space between the point and the throat, or the point at which the lack of alignment occurred, the guard rail may not have functionated, or the motion of the velocipede may have been interfered with by the space about the point, or also by the lack of mechanically accurate alignment of the west rail of which plaintiff complains. "It may have dropped into the frog." Defendant owed the duty to exercise due care. That duty might, under conceivable circumstances, have involved the necessity of giving an employee who was operating a motor tricycle warning of the danger of passing over a frog somewhat out of alignment on a motor tricycle, unless he was going very slowly. No issue was raised by the pleadings or on the trial on this subject in this case. Moreover, this plaintiff would have known this by the exercise of ordinary observation. All reasonable question on the subject is eliminated by his own testimony "that he knew that the light car or velocipede he was running could easily be derailed when passing along the track, and especially when passing over a switch, unless he was most careful." Plaintiff knew, and sought to remedy the slight structure of the frame of the tricycle, and was familiar with the peculiarities of its construction and the general nature of the track over which it was run.

It is to be borne in mind that defendant's primary duty with respect to its track was to exercise commensurate care for the safety of transporting by means of locomotive engines and freight and passenger cars. Defendant was, of course, subject to the ordinary rule that the master must exercise due care in furnishing his servant a reasonably safe place in which to do his work. But it was not bound to anticipate that its employee would operate a vehicle intentionally made light in weight, slight in structure, and with smaller wheels at an excessive rate of speed; and it was not required to furnish and maintain its track in such condition as to make that rapid transit safe. By what means plaintiff could make the same track meet the necessities

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of a tricycle and of an ordinary car or engine, both going at a rapid speed, has not been made to appear. If the alignment had been mathematically correct, there would be obvious and certain danger in sending even a hand car—a fortiori, a velocipede—over the track at a rapid rate of speed. In this case, if defendant had been going slowly enough, the accident would not have happened. The witnesses differed as to the rate of speed at which plaintiff was going. The estimates varied from the speed of a train to six or eight miles an hour. We undertake neither to reconcile these estimates nor to determine the credibility of the witnesses. Nor do we dogmatically assert that any speed over three miles an hour, as one of the witnesses insisted, would be too fast; nor that from eight to ten miles an hour was not slow enough. Under all the circumstances of the case, we are of opinion that the duty defendant owed plaintiff did not require it to maintain a frog so mathematically perfect or in so precise alignment with the rail that plaintiff could run his light machine, with its wheels of smaller diameter, thinner flanges, and narrower tread, at such a rate of speed that the smaller guide wheel in front could climb the rail and that the machine would then run fifteen feet with such force that, when it struck a tie or other obstacle, its axle would break. We conclude that actionable negligence on defendant's part was not shown.

It is perhaps immaterial whether the conclusion in this case be rested upon the absence of actionable negligence on defendant's part, or upon plaintiff's own contributory negligence or assumption of risk. The same conclusion may follow from any point of view. Judgment for defendant notwithstanding verdict is ordered.

Reversed.

STATE v. NORTHWESTERN TELEPHONE EXCHANGE COMPANY.[1]

March 26, 1909.

Nos. 15,926, 15,927—(50, 51).

Proportionate Part of Interstate Earnings Taxable.

A proportionate part of the earnings of the property of telephone companies within this state, resulting from its use in interstate commerce,

[1] Reported in 120 N. W. 534.

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constitutes a part of its gross earnings, upon which it must pay the three per cent. tax provided for by chapter 314, Laws 1897.

Gross Earnings Tax is Tax on Property.

The gross earnings tax provided for by the laws of this state is a tax upon the property of the corporations, and not upon the corporations, or upon the right to engage in business. Its adoption effected a change in the form, but not in the character, of the tax.

May be Computed Regardless of Use of Property.

The state has a right to impose a tax upon the property within its borders, regardless of the uses to which it is devoted by its owners; and as a method of determining what is a fair and equitable property tax it may permit the tax to be computed on the basis of a fixed percentage of the earnings of the property.

Collections for Others are not Gross Earnings.

Money collected by a telephone company from its patrons and subscribers for other telephone companies, with which it has traffic arrangements, is not a part of its gross earnings.

Special Messenger Fees are Gross Earnings.

Money received from messengers not regularly in the company's service, but employed specially to call nonsubscribers to the telephone stations, and money collected from the company's patrons and subscribers as messenger charges actually paid to persons in whose buildings the company's booths are located, and as compensation for such location, are a part of the gross earnings.

Value of Free Service not Gross Earnings.

The amount which the regular rates would have produced, had the service, which was in fact rendered without charge, been charged for at the regular rates, is not a part of the gross earnings.

Action in the district court for Hennepin county to recover $4,959.48 alleged to be due the state as part of defendant's gross earnings tax for the year 1904. The case was tried before Holt, J., who found for the state in the amount of $1,481.16. From judgment entered pursuant to the findings, both parties appealed. Affirmed on both appeals.

Edward T. Young, Attorney General, *Chas. S. Jelley,* Assistant Attorney General, and *Geo. W. Peterson,* Assistant Attorney General, for the State.

Cobb & Wheelwright, and *E. A. Prendergast,* for defendant.

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ELLIOTT, J.

This case comes to this court upon appeals by both the plaintiff and the defendant; but the questions involved are so intimately connected that we will dispose of the appeals in one opinion.

The action was brought by the state against the Northwestern Telephone Exchange Company to recover the sum of $4,959.48, alleged to be due for taxes which were properly payable under the provisions of the gross earnings law of this state. It was alleged that the defendant was a telephone company, engaged in carrying on a general telephone business, with its principal office and place of business in the city of Minneapolis; that the company, in lieu of all other taxes and assessments upon its property held for use in and about its business, was obliged to pay into the state treasury on January first of each year three per cent. on its gross earnings; that for the purpose of ascertaining said gross earnings the company had been and is obliged, on or before December fifteenth of each year, to furnish a verified abstract of such gross earnings to the state treasury; that a statement was furnished for the year 1904, but that it was incorrect, in that the company failed to report and furnish a certain part and portion of its gross earnings, which were subject to taxation for that year; that the items thus omitted were as follows:

		Earnings	Tax at 3%
Item 1.	Interstate toll earnings.....	$36,252 53	$1,087 57
Item 2.	Messenger earnings.....	36,795 76	1,103 87
Item 3.	* * * * * * * * * * * * *		
Item 4.	Receipts from sale of material.....	33,736 22	1,012 09
Item 5.	Rebates or charges to earnings before reporting the same for taxation purpose to Minnesota.....	36,374 08	1,091 22
Item 6.	Income other than from operation of the telephone company, such as dividends and interest on securities owned by it.....	12,157 91	364 73
Item 7.	Free telephone.....	10,000 00	300 00
	Total	$165,316 50	$4,959 48

The company refused to pay these amounts, for the reason, as it alleged, that the items were not such as were properly included within

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a gross earnings tax. The trial court found from the evidence and the stipulation that the business of the defendant company during the time it has been operating and carrying on a telephone system within this state consisted and consists of exchanges, all of which are connected with it by long-distance telephone lines for the transmission by the public for hire of messages by telephone; that its principal place of business has been and is in the city of Minneapolis; that in addition to its telephone system within the state of Minnesota, during all the times in question, it has been maintaining and operating similar telephone systems, exchanges, and toll lines throughout the states of North and South Dakota and Wisconsin, and toll lines within the state of Iowa, all of which said systems, exchanges, and toll lines have been operated in connection with its toll lines and exchanges in Minnesota; that it has been and now is a public carrier of messages by telephone, transacting its said business as such carrier over its various lines, wires, and systems herein referred to; that during all of said times messages by telephone have been continuously sent and are now being sent from various points within the state of Minnesota to points without said state, and from points throughout said state to points within said state, over said toll lines and systems, and that it has, during all said times, been engaged in interstate commerce, as well as intrastate commerce; that during all of said times said telephone company had traffic agreements with telephone companies operating in states other than those above enumerated, so that its patrons and subscribers within the state of Minnesota could, and in fact do, send messages by telephone to points within said state of Minnesota over the toll lines of the defendant and the lines of said other companies to other points, where telephone systems exist in the United States, east of the Missouri river; that in the same way messages by telephone have been and are now being sent over the lines aforesaid from all points where telephone service exists east of the Missouri river to points within the state of Minnesota.

As to item 1 referred to above, the court found that during the year 1904, in addition to the earnings reported from business done wholly within this state, other earnings from the system were received, and that the sum of $36,252.53, specified under such item 1, represents a proportion of such earnings, based upon the proportion of

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the mileage within the state of Minnesota over which said business was done to the entire mileage of the company over which said business was done, of earnings on all said interstate business for the year 1904 passing through, into, or out of said state; that prior to the commencement of this action no request had been made by the state of Minnesota upon defendant to pay a tax on any of the defendant's earnings, except those derived exclusively from telephone business beginning, continuing, and ending within the limits of the state of Minnesota, except that in the year 1898, when the defendant made its first return and abstract of earnings after the passage of chapter 314, p. 581, of the Laws of Minnesota for the year 1897, the question was taken up with the treasurer of the state of Minnesota as to whether or not the defendant should pay any tax on earnings such as those specified in item 1 of the complaint; and the letters and requests attached as exhibits to the answer, and the opinion then given by Hon. H. W. Childs, Attorney General of Minnesota, also truly set out in the exhibits attached to the answer, are all that was done by the officers of the state in regard to such claim for taxes until this present action was brought by the attorney general.

As to item 2, receipts for messenger earnings, [it was found] that $25,301.01 thereof represent amounts collected by the company from its patrons and subscribers, for other telephone companies, with whom the defendant had traffic arrangements, as connecting carriers, for terminal fees and messenger services for said companies, and for the share of said companies, for sending the messages over their respective lines, and that said amounts, and all thereof, were paid over by the defendant company to the said other companies as and for their share for sending such messages; that $6,494.75 of this item represents money charged and received for messengers not regularly in the defendant's service, but employed specially to call nonsubscribers to the telephone stations; and that $5,000, the balance of this item, has been collected from the defendant's patrons and subscribers as messenger charges actually paid to the persons in whose buildings the defendant's telephone booths were located, and also as compensation for such location.

Item 3 in the complaint was withdrawn.

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As to item 4, [it was found] that the defendant, during 1904, sold to other telephone companies telephone poles and materials, for the sum of $33,736.22; that said sales were made as an accommodation to said other companies, and not for profit, nor were they made in the operation or management of the defendant's telephone system; that said materials so sold as aforesaid were never a part of the defendant's telephone system, or any part of the appurtenances or appendages thereof; nor were said materials ever held or used for, in, or about the construction, repairing, renewal, maintaining, or operating of its said telephone system or lines; nor were the receipts from said sales derived by the defendant from the owning, operating, and conducting of any of its telephones or telephone lines, or the carrying on of its said telephone business, and the giving of a general telephone service in the state of Minnesota.

As to item 5, [it was found] that the defendant received during 1904 from railway companies transportation of the value of $1,625, which is included in said item; that the balance of $34,749.08 does not represent any income to the defendant, but are rebates and discounts to customers, arising through facts such as the following: At the beginning of the month a customer is charged rental in advance at the regular rate, and in cases where the service is terminated before the expiration of the month, for which said rental is charged, a proportionate rebate or credit is entered on the books, so as to balance the charge made. Certain customers, having a number of telephones, are charged on the books with the regular price and then credited with such discount as has been agreed upon between the defendant and said customers. Rebates are also made on interrupted service, or failure to render service already charged for.

As to item 6, [it was found] that during 1904 the defendant received as interest and dividends on securities owned by it $12,157.91, but that said securities were never a part of the defendant's telephone system, or any part of the appurtenances or appendages thereof; nor were said securities ever held or used for, in, or about the construction, repairing, renewal, maintaining, or operating of said system; but such securities were held by the defendant by way of investment only.

As to item 7, [it was found] that the defendant furnished during 1904 telephone service to certain municipal corporations, public officials,

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and charitable institutions, which, if charged at the current rates for similar services, would amount to $13,275; that said services were furnished free and without charge, and the defendant has not received any compensation, money, or anything of value therefor, nor does it expect to make any charge therefor.

From these facts the court found that the state is entitled to the three per cent. tax as follows: On $36,252.53, being the whole of item 1, interstate toll earnings; on $11,494.75 of the amount included in item 2, messenger earnings; and on $1,625 of the amount included in item 5, transportation from railroad companies. That the amount payable thereon for the year 1904 amounts to $1,481.16. The claim of the state to the tax on the balance of the messenger earnings, on the whole of the receipts from the sale of material, on the balance of rebates, on the receipts from dividends on securities held by the company, and on the amount which, at regular rates, would have been received for the use of telephones which were in fact furnished free to the users, was disallowed by the trial court.

1. The principal question raised upon this record is whether the Northwestern Telephone Exchange Company is required under the provisions of chapter 314, Laws 1897, to pay the gross earnings tax therein provided for on the earnings from its property situated in this state and used in interstate commerce. This statute is entitled "An act to provide for the imposition and collection of a proportionate earnings tax upon the gross earnings of all property within the state of Minnesota of all telephone companies or owners whose lines are in or extend into or through said state, in lieu of other taxes."

Section 1 of this statute provides that "any person or persons, copartnership, association or corporation now or hereafter organized under the laws of this state, or any copartnership or association or corporation now or hereafter organized under the laws of any other state, territory or country, owning, operating and conducting telephones and telephone lines which are in or extend into, in or through this state, and carrying on a general telephone business and giving a general service in this state, shall pay into the state treasury on or before the 1st day of January in each year the sum of three (3) per cent. of his or their or its gross earnings, which said payment shall be in lieu of all other taxes and assessments whatever upon each said telephone

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company or system, its appurtenances and appendages, and upon all its property held or used for, in or about the construction, repairing, renewal, maintaining and operating its system or lines and also upon the capital stock of any such association or corporation or the income of any such person or persons."

Section 2, so far as material, reads as follows: "For the purpose of ascertaining the gross earnings aforesaid, an accurate account of all such earnings shall be kept by such owner, owners, copartnership, association or corporation, and an abstract thereof shall be furnished by such owner or owners, copartnership, association or corporation to the treasurer of this state on or before the 15th day of December in each year."

The telephone company claims that the language of this statute, when read in connection with that used in the title, shows that the legislature intended to restrict the tax to earnings on business which originates and ends within this state. The authorities cited do not, in our judgment, sustain this contention. Practically all the cases which give support to this view proceed on the theory that any other construction would render the particular statute unconstitutional as an attempt to impose a tax upon interstate commerce. In accordance with the established rule of construction, it was therefore held that the statute should, if possible, be so construed as to render it constitutional. The Dakota statute construed in Northern Pacific v. Barnes, 2 N. D. 310, 51 N. W. 386, and McHenry v. Alford, 168 U. S. 651, 18 Sup. Ct. 242, 42 L. Ed. 614, provided for the payment in lieu of all other taxes of "a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated within this territory."

In the McHenry case it was suggested that a construction which would make this statute include earnings arising from the transportation of persons and property between different states would render it unconstitutional, but the question was not decided. The same idea seems to have controlled the decision of the Barnes case; that is, in order to sustain the statute, it was assumed that it was necessary to so construe it to make it applicable to intrastate commerce only.

So, in Pacific Express Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035, the construction adopted was said to be necessary

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in order to sustain the statute. The statute provided that express companies should make a report to the state auditor, "showing the entire receipts for business done within this state," including "its proportion of gross receipts for business done by such company in connection with other companies." The court reached the conclusion that "it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever, and that the statute, when fairly construed, does not in any manner interfere with interstate commerce."

In Western Union Tel. Co. v. Alabama State Board, 132 U. S. 472, 10 Sup. Ct. 161, 33 L. Ed. 409, a statute which imposed a tax upon the gross amount of the receipts of the company derived from the business "done by it in the state" was construed to apply only to the company's receipts from business done within the state.

By the statute under consideration in State v. United States, 93 Md. 314, 48 Atl. 918, a tax was imposed upon the gross receipts of certain corporations doing business within the state, and it was said that the legislature could not have intended to levy a tax upon the business of the company done by it without the state. "This construction of the statute," said Mr. Justice Briscoe, "is strengthened by a reference to that part of the statute which provides that the provisions of the act shall apply to all corporations of a like kind to those enumerated by the act, which are doing business in this state, and which are incorporated by or under the laws of any other state. It is, then, quite clear that the tax required by the statute to be paid by foreign corporations is limited to business done by them within the state, and it cannot be presumed that the legislature intended to unjustly discriminate against domestic corporations, doing business in this state, by taxing the business done by them outside of the state."

When we consider the principles which seem to have controlled the decision of these cases, it is apparent that they do not require us to adopt the construction contended for by the telephone company. The gross earnings tax provided for by the Minnesota statutes is not a tax upon the right to carry on interstate commerce, and there is nothing in the constitution or laws of the United States which forbids the state to tax property which is within its borders merely because it is employed in interstate or foreign commerce. Pullman's Palace Car Co.

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v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; Judson, Interstate Commerce, § 19; State v. Twin City Tel. Co., 104 Minn. 270, 286, 116 N. W. 835. The gross earnings tax is a system by which the amount of tax upon the property is determined by a method which has generally been found equitable and satisfactory. It is a tax upon the property, and not upon the corporation. As said in Minneapolis & St. L. R. Co. v. Koerner, 85 Minn. 149, 88 N. W. 430: "It has long been settled by the decisions of this state that the gross earnings tax law was not intended to change the character of the tax, but, for the purpose of certainty, was intended to change the method of computation. The amount required to be paid remains a tax upon the railroad property, and not against the corporation." See also City of St. Paul v. St. Paul & S. C. R. Co., 23 Minn. 469; County of Ramsey v. Chicago, M. & St. P. Ry. Co., 33 Minn. 537, 24 N. W. 313; County of Todd v. St. Paul, M. & M. Ry. Co., 38 Minn. 163, 36 N. W. 109; County of Traverse v. St. Paul, M. & M. Ry. Co., 73 Minn. 417, 76 N. W. 217. That is, the state has the constitutional right to impose a tax upon the property within its borders, regardless of the use to which it is devoted by its owners, and, as a method of determining what is a fair and equitable property tax, it may permit the tax to be commuted on the basis of a fixed percentage of the gross earnings of the property.

When chapter 314, Laws 1897, was enacted, the gross earnings system of taxation as applied to railroads had been in force for many years. It had been fully developed through general and special legislation and constitutional amendments, and had proven so satisfactory that it was thought advisable to extend it to other kinds of corporations. In 1895 the constitution was so amended as to authorize the legislature to impose a gross earnings tax upon telephone and other corporations therein named. When it enacted chapter 314, Laws 1897, the legislature intended to extend the system which had already been applied to railroads, without substantial change or modification, to other corporations. State v. Twin City Tel. Co., supra; State v. Northwestern Tel. Exch. Co., 84 Minn. 459, 87 N. W. 1131. In that system the words "gross earnings" had a definite meaning, which must have been understood by the legislature. In chapter 235, p. 368, Laws 1889 (section 2753, G. S. 1894), the words "gross earnings," as applied

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to foreign railroad corporations, were declared to mean "all earnings on business beginning and ending within the state and a proportion based upon the proportion of the mileage within the state to the entire mileage over which such business is done, of earnings on all interstate business passing through, into or out of the state." It is also stated in the statute that this definition of gross earnings "is in accord with the uniform practice of all railroad companies heretofore reporting gross earnings for taxation under the laws of this state." The same definition, in substance, is found in chapter 253, p. 375, Laws 1903.

When this statute was enacted in 1897 the railway companies were required to pay, and in fact were paying, the state a gross earnings tax upon a proportionate part of their earnings from interstate, as well as from all their intrastate, business. When the system was extended, it is reasonable to assume that the legislature intended that the words "gross earnings," when applied to telephone companies, should have the same meaning which had been given them in existing statutes applicable to railroad companies. The telephone companies, like the railroad companies, were engaged in interstate, as well as intrastate, commerce, and they were taxable upon their property in the state which was earning an income while used in interstate commerce. We cannot assume that the legislature intended to relieve the property from future taxation to the extent of its income from interstate business, which was an important element of its earning power, and which must previously have been taken into consideration in determining the taxable value of the property itself. Under the gross earnings system the railroads were, in order to commute their general property tax, required to pay a tax upon a proportion of the earnings of the property in the state used in interstate commerce, as well as on what resulted from its use in intrastate business. The principle was equally applicable to telephone companies, and there is no apparent reason why, in fixing a tax which was in theory the exact equivalent of the general property tax, a part of the earnings which constituted an essential element in determining the value of the property should have been excluded. A fair and reasonable construction of the statute leads to the conclusion that the legislature intended that a proportionate part of the earnings of the telephone companies, arising from interstate

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business, should be included in the gross earnings on which the tax was computed.

For the purpose of ascertaining the legislative intention, we may look to the title as well as to the body of the statute. State v. O'Connor, 81 Minn. 79, 83 N. W. 498; Loper v. State, 82 Minn. 71, 84 N. W. 650; Robinson v. U. S., 42 Ct. Cl. 52; Moore v. Chartiers, 216 Pa. St. 457, 65 Atl. 936; Forman v. Sewerage Board, 119 La. 49, 43 South. 908; Allen v. Commissioners, 57 N. J. L. 303, 31 Atl. 219; Wilson v. Spaulding (C. C.) 19 Fed. 304. The telephone company lays great stress upon the phrase "all property within the state of Minnesota," which appears in the title; but, if it was the intention that this tax should be computed as three per cent. upon the income from intrastate business only, it is difficult to see why the title of the act also recites that the purpose is to provide for the imposition and collection of "a proportionate earnings tax" upon all such property. The use of the words "proportionate earnings tax" indicates that the legislature intended to apply to telephone companies the system under which other corporations were then paying taxes upon their property used within the state, based upon their earnings from intrastate business and a proportionate part of their earnings from interstate business. No question of proportion or apportionment could enter into the imposition and collection of a tax upon the gross earnings of property used in intrastate commerce only; but, before the tax could be estimated upon that part of the income of the company which resulted from the use of its property within the state in interstate commerce, it was necessary to determine the proportion which that business bore to the entire interstate commerce of the company. It was not essential that the statute should provide in detail the method by which the apportionment should be made. Any method which would be just and equitable and consistent with established legal principles might be used. For the purpose of the imposition and collection of the same kind of tax on railroads, a method of apportionment was already in use in the state, and we think it may fairly be assumed that the legislature had this in mind when it enacted the statute, which was designed to apply the same general system of taxation to telephone companies.

2. The argument based upon the practical construction which has been given the statute by the executive officers of the state can have

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little force under the circumstances. At the most, the facts merely show that the tax has not been collected. The opinion of a former attorney general to the effect that it was probably not collectible was, like the decisions in several cases above referred to, based upon the absence of express language in the statute and the assumption that a contrary ruling would render the statute as a whole void. It should be noted, however, that the opinion of the attorney general contained a recommendation that the question should be submitted to the courts for determination. After several years' delay, this has now been done.

3. The trial court properly held that the $25,301.01 included in item 2, which had been collected by the defendant from its patrons and subscribers for other telephone companies with whom it had traffic arrangements, was not a part of its gross earnings, but that the $6,494.75 received for messengers not regularly in the defendant's service, but employed specially to call nonsubscribers to the telephone stations, and the $5,000 collected from the defendant's patrons and subscribers as messenger charges actually paid to the persons in whose buildings the company's booths were located, and as compensation for such location, were a part of its gross earnings. These items constitute a part of the income of the company, and the fact that the money was disbursed to persons who rendered services to or supplied accommodations for the company does not change their character. The question of profit is immaterial.

The state's claim to the tax upon the amount of certain rebates is manifestly without merit, and the same may be said with reference to the claim that the tax should be paid upon the amount which the regular rates would have produced, had the service, which was in fact rendered without charge, been charged and collected for at the regular rates.

The securities which produced dividends and interest, while the property of the telephone company, were not used in connection with its business, and the court, therefore, properly held that the income therefrom was not a part of the gross earnings of the company within the meaning of the statute. The other items do not require consideration.

Affirmed on both appeals.

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HARVEY A. SPENCER v. ALBERT LEA BRICK & TILE COMPANY.[1]

March 26, 1909.

Nos. 15,943—(235).

Assumption of Risk—Contributory Negligence.

Plaintiff, engaged in putting dressing on a belt near the driving pulley in his employer's shop, was "squatting down" on a beam under the roof, with one leg over a rapidly revolving coupling in the main shaft. His clothing was caught in its projecting bolts. Plaintiff was badly injured. He was an experienced and educated mechanic of full age, whose duty it was to have a general supervision of the machinery of the plant. He had had abundant opportunity for observing the location and nature of the coupling. His own testimony tended to show that he had actual knowledge thereof. His attention had been directed to this particular coupling; and he had on the day of the accident, or on the previous day, repaired a companion coupling on the same shaft a few feet away. His cramped position brought the revolving coupling directly in the line of his sight. He said himself that he could have seen it, if he had looked at it. To a limited extent he admitted knowledge of the danger and appreciation of the risk. He attempted to work in a dangerous way, although other practical and safe means were at hand. It is *held* that he assumed the risk and was guilty of contributory negligence. The fact that the belt was smoking and might have burned at that place did not constitute such an emergency as to exonerate plaintiff from the consequences of his own conduct.

Action in the district court for Freeborn county to recover $25,000 damages for personal injuries. The case was tried before Kingsley, J., who directed a verdict in favor of defendant. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

Morgan & Meighen, for appellant.

H. C. Carlson and *Lafayette French,* for respondent.

JAGGARD, J.

Plaintiff and appellant was employed by defendant and respondent as an engineer in defendant's factory. Another of defendant's servants called the attention of defendant's general manager to a belt which

[1] Reported in 120 N. W. 370, 687.

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was slipping on a pulley attached to the main shaft revolving one hundred eighty times a minute, and which therefore failed to operate the pug mill with which it was connected. It was the approved custom to apply a thick resinous fluid, called belt dressing, to stop the slipping. This servant had already attempted to apply the belt dressing, but had failed. Upon his complaint the general manager, having attempted, in the vicinity of the driven pulley, to stop the slipping, and having also failed went to the engine room and called plaintiff out to attend to the trouble. Plantiff came to the platform near the driven pulley, and did not succeed in applying the dressing at that place. He noticed that the belt was smoking at the driving pulley, and knew that, when it commenced smoking, the belt at that place would be destroyed, unless a remedy was provided. This required immediate action. "A man has got to act with promptness." He had left the engine, and naturally wanted to get back to it as soon as he could, especially because he "did not get the engine properly started." He then went up a ladder to a rectangular sort of platform surrounding the driving pulley. He walked on one plank towards the wall, then at right angles behind the shaft to a large beam, 9x12, which was a structural part of the building, and then along that beam towards the belt. To reach the point it was necessary to cross with at least one leg the coupling on the main shaft somewhat east of the large pulley under which the belt ran. The coupling was twelve inches long and eight inches in diameter. Set in grooves were six projecting bolts, which came out from one-half to three-fourths of an inch beyond the surface of the coupling. These bolts projected in the direction that the coupling revolved, and formed "kind of teeth," likely to get hold of any clothing that touched them and draw it round under the coupling. The top of the coupling by which plaintiff was injured was six inches above the top of the surface of the timber, over which it rested; for the bottom line of the shaft was even with the top of the timber, and the timber was eight inches in diameter, of which two inches extended into the groove at the timber and two inches above the top line of the shaft, which was four inches in diameter. Above the timber was the sloping roof. The distance between the timber on which the coupling was rested and the roof diminished as the coupling was approached. The height from the timber to the lowest rafter at the wall was about four feet. This

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distance decreased toward the upright support of the roof, until at the first upright the height was but two feet and ten inches. Plaintiff, a light, agile man, although only five feet six inches tall, in order to approach the pulley, had to get into a cramped position. The distance from the extreme edge of the coupling to the edge of the first upright around which plaintiff put or intended to put his arm for support was very small, probably eight and a half or nine inches. Into this space he put his right foot, straddled the line shaft, and "squatted down." He had in his hand a can of belt dressing. While in this position, in the attempt to apply the belt dressing, the unguarded and protruding bolt heads caught his overalls, whereby his leg was drawn in between the coupling and the beam and seriously injured. The revolving coupling was unguarded in fact, although it was entirely feasible to have provided full protection against the danger from it at a slight expense. The court directed a verdict for the defendant, because plaintiff saw the revolving coupling when he was stepping, but was oblivious to what he was doing. The danger was open to ordinary observation. Plaintiff was therefore precluded by his own conduct from recovery. A motion for a new trial on the ground of errors of law and of newly discovered evidence was denied. This appeal was taken from that order.

The trial court assumed that defendant's negligence was sufficiently shown. In view of the conclusion which we feel constrained to reach upon plaintiff's contributory negligence, we also assume that the place in question was a "dangerous place, * * * near to which any employee is obliged to pass or to be employed," within the meaning of the local factory act (section 1813, R. L. 1905). The gist of the appeal is whether the trial court was justified in its peremptory instruction that defendant had assumed the risk and was guilty of contributory negligence as a matter of law. The two distinct defenses, so far as involved in this case, were so interrelated that for purposes of practical convenience they have been considered together in the record. We will therefore so treat them here.

The facts must be considered in the light of principles of law as to which little controversy exists. Plaintiff insists that he "had a right to rely on the assumption that the defendant had performed its statutory duty. He had a right to assume that all projecting bolts, cou-

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plings, etc., were protected by guards, or so located as to be safe. His relying on that assumption would not be contributory negligence." This is a clear enough statement of a well-recognized rule of law, except that it fails to recognize that the servant's knowledge of danger and appreciation of risk and his own carelessness may preclude his recovery. It is also undoubtedly true that ordinarily assumption of risk and contributory negligence are for the jury; but it is equally true that where the facts are uncontroverted, and where reasonable men would not draw different inferences from them, the question is for the court. Nor is there any doubt as to the recognition of the principle, which will subsequently be more fully considered, that an emergency may justify conduct which would otherwise be careless. Finally, the facts must be viewed most favorably for plaintiff, and controverted facts resolved in his favor. The circumstances of no particular case to which counsel has referred us sufficiently resemble those presented by this record as to render its discussion useful or appropriate. It would be obviously improper to undertake to here review the whole testimony developed on direct and on cross examination, nor is it possible to discuss the variations in plaintiff's testimony. What will be quoted from it is not intended to represent all the plaintiff said. Plaintiff was not entirely consistent. His inconsistencies, however, usually arose from general denials and from statements of conclusions which are necessarily controlled by his more specific testimony. A number of controlling considerations appear in the record.

1. Plaintiff was not an ordinary servant, and was not called from his regular employment to do special work in another and unfamiliar department. On the contrary, it was the duty of plaintiff, an experienced, educated, and intelligent mechanic of full age, to keep a general supervision of the machinery of the plant and to see that it was running properly when it was in operation. In substantially his own words, he did the oiling in the machinery room; he would go occasionally and see if the machinery was in proper order—see if it needed repairing and that there were no loose bolts; he kept an eye out all the time to see if anything went wrong; if he saw that a bolt was loose, it was his business to tighten it up; in fact, anything that went wrong there along the line shaft he looked out for it, to see that it was corrected.

2. Plaintiff's general opportunity of observing the location and na-

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ture of the coupling by ordinary observation was abundant. The coupling was plainly visible from the floor above which the platform had been erected. When he passed from the engine room into the machinery room, he would pass by the coupling, and a glance at the line shaft would have disclosed the coupling by which he was injured. "Q. As a matter of fact that coupling was in plain sight from the place where you were working every day? A. If a man looked toward it, he wouldn't help but see it. * * * Q. Anyone who looked toward the line shaft, in the neighborhood of where that coupling was, could see it? A. Yes, sir." There was much testimony to the same effect. His position as an employee imposed upon him an especial duty of observation and inspection. He differed in this respect from the ordinary servant. His own testimony tends strongly to show that he performed that duty and that he had actual knowledge on the subject. He said he knew that there was no bearing on the timber, and "presumed" that he had examined it when he first went to work. Such examination would, of course, have revealed the coupling. He testified: "Q. You knew there must be couplings along there somewhere on the sixty feet of line shaft? A. Yes, sir. * * * I don't say I hadn't seen it; but I hadn't taken enough notice of it, so it impressed my memory that it was in that place. * * * I certainly must have seen it in passing along that shaft; but I didn't take enough notice of it, so it was impressed on my memory. Q. You must have kept watch of that part of the line shaft as much as any other, to see that it was in proper shape? A. Yes, sir." He had, indeed, told the general manager "that the bolts in the coupling would have to be watched closely, so that they would not get loose." He had been occasionally about the shaft.

3. Plaintiff's attention was directed specifically to this coupling at the time he entered defendant's employment, and afterwards and in a less specific manner immediately before the accident. Defendant's general manager testified to telling plaintiff, in substantially the manager's own language, when plaintiff started to work there, that the bolts in that coupling have to be watched closely, so that they would not get loose. He pointed out the particular coupling to plaintiff, and told plaintiff his previous unfortunate experience with it. From time to time while plaintiff was working there, when the machinery was in

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operation, the manager asked about the coupling and how the bolts were in this coupling. Plaintiff said they were all right. On the very morning of the accident plaintiff had told him that there were one or two bolts that were broken in a companion coupling, which apparently was about twenty feet away from the coupling in question. Plaintiff went out, found a bolt, and they both climbed up to where it was and put one on. While they were repairing that coupling, the manager asked plaintiff, "How is the bolts in that coupling?" referring to the coupling in question which later hurt plaintiff. Plaintiff said they were all right. The particular reason in the manager's mind for keeping especial watch of the coupling in question was that he had learned, "from assisting putting the other coupling on, that if the bolts got loose and that coupling broke again, it would necessitate cutting the shaft and moving the shaft together, so as to get new key seats in the shaft." Plaintiff himself does not deny this testimony in toto. He remembered having, with the manager, tightened the bolts on a neighboring coupling on the same morning as the accident, or on the day previous. The reason was that they were loose. He himself had found a piece of coupling lying on the floor. It had come apart, and a piece of the coupling had broken out. He immediately went and examined the coupling. He said that he did not remember that the general manager had told him to keep watch of that particular coupling, to see that it would not get loose. He modified this by saying: "I can't positively say that he did not do that. I can say, if he did, he did not make it impressive enough so that I remember it."

4. A consideration of especial importance is that plaintiff's position at the time of the accident necessarily involved close proximity of his eyes to the revolving coupling. That coupling, projecting, as it did above the beam, was in the direct and necessary line of his vision. He himself testified: "Q. Any one who looked toward the line shaft in the neighborhood of where that coupling was could see it? A. Yes, sir. * * * If a man looked toward it he wouldn't help but see it." In view of plaintiff's own version of this matter, it is not necessary to consider the question of probable obscurity of the light or the presence of accumulated dust. His own words show that he looked where there was no danger, but failed to see the imminent peril right at his feet, in

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the direction in which he was going, and which he was forced to look at by virtue of his stooping.

5. Plaintiff knew of the danger and appreciated the risk. To the ordinary servant it might have been that the coupling, revolving at the rate of one hundred eighty or more times a minute, would have presented an appearance which might have been mistaken for the shaft. Cf., e. g., Larson v. Haglin, 103 Minn. 257, 114 N. W. 958. Plaintiff, however, was an expert. On the morning of, or on the day before, the accident he had assisted in repairing a companion coupling. He knew of the presence of the bolts and of their projection. He had heard of instances where men had clothes caught on bolts and set screws on the same kind of coupling as that here involved on the same appliances and shaft. He knew it would not be safe for a man to run against such a coupling or to get his clothes caught. He never thought that there was danger, although, if he had discussed it with any one, he would have said it was a dangerous piece of apparatus. He knew, as a man of mechanical experience, that it was not a safe thing to come in contact with it when it was moving. Plaintiff's testimony on this subject, in answer to questions asked by his own counsel, does not materially tend to alter this view of the case. Taking the testimony as a whole, and giving due weight to the prominence of the revolving shaft directly in the line in which plaintiff's previous opportunity and general and special occasion to observe the existence and character of the coupling, not casually, but in the performance of his duty, we are of opinion that his own testimony shows knowledge of danger and appreciation of risk.

Finally, plaintiff attempted to apply the belt dressing in an extremely dangerous place, despite the fact that there were other safe and practical means of accomplishing his purpose. A friction clutch was provided. If it had been used, the injury could have been avoided. Plaintiff himself testifies that, if the friction clutch had been working, its use would have been the quickest way of preventing friction on the driving pulley. If he had thrown it out of gear and stopped the slipping, he could have applied the belt dressing on the belt as it was moving, if it was moving. The testimony did, it is true, tend to show that at other times prior to the accident the friction clutch had been out of order; but there was uncontradicted and positive testimony that it

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was in order at the time of the accident. It was plaintiff's own judgment at the trial that he could have applied the belt dressing with great convenience and safety, taking all things into consideration, on a side of the platform other than that to which he attempted to apply it. Upon the whole record this consideration does not impress us as having the conclusive force attributed to it by defendant's counsel, because of the servant's right to rely upon the performance of the master's duty to safeguard machinery, and because it does not necessarily impeach the care exercised by plaintiff that his hindsight had proved better than his foresight. None the less plaintiff's actual knowledge of this coupling and of its unprotected condition, and the knowledge which the record reasonably attributes to him, does not furnish justification to his action in disregarding the plain evidence of his own senses and in refusing to avail himself of several means at hand for doing the work.

It remains to consider the fact on this state of facts of the emergency element of the case. The rule is clear that if the servant's position was dangerous, owing to his master's negligence alone, and the servant exercised the care of a prudent man, that was all that was required; that where one in such position, not having time to judge the best way of doing, selects a method not the best, the law would not impute negligence so readily as if he had time to choose; that another might have done differently; but the only question was, what did care and prudence require, and did he do it? Pennsylvania v. Varnau (Pa.) 15 Atl. 624. The usual application of that principle has been made in cases in which the servant himself is placed in a position of peril. Undoubtedly it may properly be invoked, also, in cases in which danger is threatened to the employer's instrumentalities or place of business. In the case at bar, however, it is more accurate to say that there was occasion for promptness, rather than that any considerable emergency had arisen. The only danger that is pointed out to us is to the belt itself. It might have burned where it was smoking. No danger to the buildng, machinery, or to employees is asserted. There was no unexpected or imminent danger in nature likely to affect the judgment. The conclusion must follow that the stress of circumstances was not so great as to exonerate plaintiff from the consequences of his own conduct.

Affirmed.

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On April 16, 1909, the following opinion was filed:

PER CURIAM.

Plaintiff, in his motion for reargument, calls to our attention considerable relevant testimony which was not referred to in the memorandum. All of it had been considered by the court. The only new matter, properly speaking, was the contention that on the record the distance between the beam on which plaintiff walked and the roof increased, instead of decreased, as he approached the place of danger. If the plaintiff be right and the defendant mistaken, both in its model produced before this court and in its construction of the record, we are at a loss to see how this would affect the conclusion. In his motion for reargument defendant reiterates, what we regard as conclusive, that he was stooping, and in a cramped position, at the time the harm complained of occurred to him. It is the fact of his position, and not the cause, which is material.

Motion denied.

OLE OLSON v. WILLARD C. PIKE and Another.[1]

March 26, 1909.

Nos. 15,998—(207).

Questions for Jury.

In a personal injury action, it is *held* that the evidence was sufficient to take the case to the jury on the issues of the defendant's negligence, the contributory negligence of the plaintiff, whether a certain foreman was a vice principal, and whether the plaintiff assumed the risk, and to sustain the verdict.

Jury not Influenced by Prejudice.

The amount of the verdict was not so excessive as to show that the jury was influenced by passion and prejudice.

Action in the district court for Hennepin county to recover $10,000 for personal injuries caused by a fall from a staging used in whitewashing the ceiling of the live stock "amphitheatre" at the State Fair Grounds. The case was tried before Simpson, J., and a jury which re-

[1] Reported in 120 N. W. 378.

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turned a verdict in favor of plaintiff for $6,000. From an order denying their motion for judgment notwithstanding the verdict or for a new trial, defendants appealed. Affirmed.

A. B. Jackson, for appellants.

Lars M. Rand, Arthur M. Higgins, and *Norton M. Cross,* for respondent.

ELLIOTT, J.

The respondent, Ole Olson, while in the employ of the appellants, Pike & Cook, fell from a scaffold, on which he was working, and was injured. In an action against his employers, he recovered a verdict for $6,000. This appeal is from an order denying the motion for judgment for the defendant notwithstanding the verdict or for a new trial.

The evidence showed, or tended to show, that in June, 1906, Pike & Cook were engaged in the construction of a building, known as the "Live Stock Amphitheatre" on the State Fair Grounds. In order to whitewash the ceilings, it was necessary to construct a staging and suspend it from the iron rafters of the building. It is difficult, without reproducing the diagrams and photographs, which are in evidence, to convey a clear idea of the manner in which this staging was constructed and suspended. It will be sufficient, for an understanding of the questions presented on this appeal, to say that the stage consisted of a wooden beam, about six inches square and twenty five feet long, the ends of which rested in iron hooks, which were attached to ropes, which were placed over and around the iron rafters. A plank about ten inches in width was laid from this wooden beam to a parallel iron beam, and on this plank the workmen stood while whitewashing the ceiling overhead. The iron rafter, around which the rope, which connected with the hook, was tied, ran from the outside wall of the building at an angle of about fifteen degrees, and it is claimed that the rope slipped on this inclined iron rafter, thus giving the staging a downward motion, which caused the man who was working on it to lose his balance and fall.

It was charged that the defendant was negligent in failing to provide the workmen with a reasonably safe place in which to work, to furnish reasonably safe and suitable appliances and material for making, erecting, and suspending the scaffold, and particularly in failing to furnish

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iron chains for supporting or suspending the staging. Stated in another form, the charge was that the rope furnished and used for suspending the staging from the slanting iron rafter was defective in quality, that a rope of any quality was unsafe for the purpose, because it had a tendency to slip on the rafter, and that a chain, and not a rope, should have been used.

The evidence tended to show that, after the staging was constructed, Olson objected to working on it, because in his opinion it was unsafe, and asked that it be suspended with chains, instead of ropes. This request was made of the defendant's foreman, and Olson testified that he went to work upon the scaffold, and continued until the time of the accident in reliance upon the statement of the foreman that he had telephoned to town for chains, and the promise that they would be used, instead of the ropes, as soon as they arrived.

The case was submitted to the jury on the theory that the negligence alleged was in failing to furnish safe and suitable ropes for the purpose. After stating the general duty which rests upon an employer to use reasonable care and to furnish reasonably safe appliances and material, the court instructed the jury that: "Under that general rule, the specific question is presented for your consideration whether or not the defendants, in furnishing the rope for use in erecting the stagings upon which this plaintiff did his work, exercised reasonable care to furnish reasonably safe and proper material for that purpose. If the defendants did exercise reasonable care in the furnishing of proper material for the use of the employees in erecting these stagings, and there was proper material there, suitable for such use of the employees, then the defendants would not be liable, even though the employees, engaged in erecting these stagings, selected out of the materials so furnished unsuitable or defective ropes. * * * You will determine * * * whether the ropes furnished were reasonably suitable or safe for such use, and, if not, whether the defendants were negligent in furnishing such ropes."

The jury were also instructed that: "The agreement claimed to have been made by the plaintiff that the defendants should furnish chains instead of ropes, even if you find such agreement was made, would not make it the duty of the defendants to furnish chains, provided the ropes they did furnish were reasonably safe and suitable for the pur-

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pose of erecting the staging. * * * The understanding that chains were to be used would not bind defendants to furnish chains in lieu of ropes, if under the evidence ropes furnished were reasonably safe and suitable for the purpose. * * * The question here involved is whether the defendants failed to exercise proper care in furnishing these ropes, and whether the rope furnished and used in this staging, from which plaintiff fell, was insufficient for that purpose. * * * Before the defendants can be held liable, it must appear, as stated, that the defendants furnished, negligently, unsuitable rope for use in erecting these stagings, and that through such negligence a defective and unsuitable rope was furnished and used on the particular staging from which plaintiff fell, and that by reason of such defective and insufficient rope, so used, the plaintiff was caused to fall. If the defendants were negligent, as claimed, and such negligence was the approximate cause of the injury, then it would not affect the plaintiff's right of recovery even though the evidence discloses that one or more of the fellow servants were also negligent in such a manner as also to contribute to cause the injury."

The defendants' claims that the evidence did not show that the rope at the west end of the beam slipped or gave way, or was insufficient, or that the swinging beam dropped any distance because of the insufficiency of the rope, or for any other reason, were all submitted to the jury under specific instructions.

1. The appellants now contend that judgment notwithstanding the verdict should have been ordered because (a) the evidence wholly failed to establish the negligence alleged as the approximate cause of the injury; that (b) the evidence showed conclusively that the respondent voluntarily assumed whatever risks the condition involved; and (c) that the foreman, Levere, to whom Olson claims to have made his complaint, and from whom he received the promise to procure chains, was not a vice principal. It is apparent that the complaint was not drawn on the theory that the defendants would have been negligent if they had furnished safe and suitable ropes; that is, the objection was not to ropes, but to the particular quality of ropes furnished and used. The conversation between Olson and the foreman, Levere, about the use of chains, had some tendency to show that the parties recognized the fact that the rope in question was unsafe; but its only real importance is in

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connection with the question of assumption of risk, to be hereafter considered. Whether the particular rope was defective seems to have been clearly and definitely submitted to the jury, and they must have come to the conclusion that it was defective, and that because of such defect it stretched, slipped, or in some manner gave way under the weight of the men who were working upon the scaffold. The question now is whether there was any evidence reasonably tending to sustain this conclusion of the jury.

The witness Tony Olson testified that the ropes furnished for use in suspending the scaffold were brought to the building by Pike & Cook; that he assisted in unloading them; that Levere, the foreman, was present, and that "it was an inferior class of ropes for that purpose; the ropes was all old ropes, short lengths, ropes that was unraveled at the ends for about a foot at each end, and they varied in length from I should say four feet to eight or ten feet in length, and from half an inch to an inch and a half in thickness, the ropes." He says that he called Levere's attention to the condition of the ropes, and that Levere replied that they were very poor ropes for that work. The carpenter refused to allow the painter to use certain good rope which was about the building, because he had to use it for other purposes.

Anton Olson testified that no other ropes were furnished, that he assisted in hoisting all the scaffolds used on the work, that he observed the ropes used, and noticed that they "wore smooth every time the swing beam had been swung—that is, the edges of the rope, of the iron wore the rope smooth; that is, in the place where it had been resting upon the iron—and that we had to turn the rope * * * a short distance, so as not to get this smooth place to rest upon the iron again." They were the same ropes which he originally examined when he helped to unload them.

Gilbert Anderson testified that he also observed the ropes with which the staging from which Olson fell was hung. "The ropes which the staging was hung with was short ends, old ropes, been used for years, was worn all over, was opening up, and the splicing was opening up, and they was in very bad condition." He observed all the ropes which were furnished for the erection of the scaffolds, and, being asked as to the character of the ropes, he replied: "It was ropes, smaller sizes, between sizes from an inch and a half an inch to an inch and a half,

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smaller and bigger sizes; some rope we have to tie two knots, and some one knot, according to make it long enough to support the hooks."

George Olson testified with reference to the rope which was on the west end of the swing beam, and which supported the scaffold from which the respondent fell: "The rope was made into a loop, tied into a loop, and pretty close to the ends, tied up pretty close, and the whole end of the rope was raveled out and untied. I think it was in a knot, square knot. Right in the end of the rope, it was all loosened up, so it made a knot I guess, about that big (indicating). Q. Now, describe the size of the rope and the character of it. A. Why the rope was about three-quarter inch or seven-eighth inch rope, and it was all frayed out—well, all around the rope—so it look pretty bad, and that is the reason why we jerked on that swing beam to see if it was going to break. Q. Did you observe anything else about the rope? A. Well, all I observed to that was it was an old rope, and it was full of lime marks and acid marks; that is all."

George Olson testified that he examined the rope on the west end of the particular staging, and that "it looked like a dead rope," by which he meant that "after a rope gets about so old, it is about next to rotten; it don't hold very much. * * * I mean a rope, after it gets about so old, weatherbeaten and laying out in the rain and snow and sun, why it gets—the fibers gets that—it easily wears smooth. When it is new, it is kind of gummy and if you take the rope, and kind of twist it that way and push it along, you can almost touch it together, so it will bulge out like one of these little rubber whistles the kids have, and it is easier to take and pull it apart; that is, to take and pull the manila apart, so it won't hang together very well. * * * Why the strength of the rope is nowheres near the strength of a new rope; that is, it don't take very much weight to pull a rope of that kind apart."

William Rick testified that he observed the ropes which were furnished for use in the erection of these stagings. "They were different lengths of rope. Some were in loops. They was old rope, and some of the strands were pretty well worn out, and it was all dead. There wasn't much life to it, like a new rope would have."

Some of this evidence related to all the ropes which were furnished

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for use in erecting the various stagings; but other parts refer to the particular rope which was used for the purpose of suspending the staging, from which Olson fell. It is true that extracts from evidence, when disconnected from the cross-examination, may give an incorrect impression; but, after considering the whole of the evidence, we are satisfied that a case was made for the jury upon the issue as to the quality and sufficiency of the rope for the purpose for which it was to be, and was, used.

2. The jury were instructed that the plaintiff assumed the risks of working upon this scaffold, unless he was relieved therefrom by a promise on the part of the foreman to furnish a chain, instead of a rope. The instructions were proper, and fully protected the rights of the defendant. The only serious question was as to whether the foreman, Levere, who made the promise, was a vice principal, or a mere fellow servant. This question was submitted to the jury as one of fact, and was determined adversely to the defendant. Pike & Cook were doing an extensive business and had numerous jobs. Putney was their general painting superintendent; but there was evidence to justify the jury in finding that Levere was in charge of the painting work on this particular building. Pike was there about twice a week, and Putney was there occasionally. As to Levere's authority, Pike testified that Levere was foreman over the painters, and that "his duties were to see * * * that the men were suitable for the work, and that he was to see that they had what they needed, by telling me or Mr. Putney, when we were there, or telephoning to the office what was necessary to keep his department in working order." The question was for the jury.

3. The serious question in the case is whether the plaintiff produced evidence sufficient to justify the jury in finding that the motion of the scaffold was caused by the lengthening or slipping of the rope, which was passed around the rafter. The appellants earnestly contend that the jury were left to mere conjecture as to the real cause of the accident. It is immaterial whether the rope lengthened or slipped. If either occurred, and caused the dropping of the platform, plaintiff can recover, if the defendants were negligent in the matter of furnishing and using the particular rope. But it is argued that, even if there was a dropping or motion of the platform, it was not caused, or at least the

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plaintiff failed to show that it was caused, by the slipping or lengthening of the rope. It was necessary for the plaintiff to prove by competent evidence that the defendants were guilty of the particular negligence alleged in the complaint, and that such negligence was the approximate cause of the accident. The jury cannot properly be permitted to speculate and conjecture as to the cause of the accident, or draw inferences, unless there was some reasonable basis therefor in the evidence; that is, there must be something in the evidence which renders the conclusion of negligence more reasonable than any other conclusion, which would be consistent with the absence of negligence on the part of the defendants. Lehman v. Dwyer P. & H. Co., 104 Minn. 190, 116 N. W. 352, and cases there cited.

Where what occurred is explainable on different theories, there must be something in the evidence itself to reasonably suggest the conclusion that it was due to one theory rather than another. "Where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of the accident justifies any departure from settled rules of proof resting upon all plaintiffs." Patton v. Texas & P. Ry. Co., 179 U. S. 658, 21 Sup. Ct. 277, 45 L. Ed. 361; Binewicz v. Haglin, 103 Minn. 297, 115 N. W. 271, 15 L. R. A. (N. S.) 1096. There was direct evidence that there was some motion of the plank. If the evidence failed to show what caused such motion, and if the fact of the accident is consistent with either of various theories, any one of which would relieve the defendant from liability, the plaintiff should fail, as it was incumbent upon him to produce evidence reasonably tending to show that the accident was caused by the specifically alleged negligent acts or omissions of the defendants.

The appellants contend that all the evidence is consistent with theories which would relieve them from liability. For instance, it is said that

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it is equally probable that Olson, in reaching over for his whitewashing pail, which was on the other plank, slipped off the end of his own plank, or tripped or stumbled against the upper end of the lower plank, which stuck up a little above the plank upon which he was standing, or he may have had a slight vertigo or dizziness in stooping over at that height from the ground, or the plank may have been slightly warped, which caused it to "wobble" when he stepped on the warped side, or a slight motion may have been caused by the sudden change of position by the plaintiff, or one of the men who were working in the immediate vicinity, or a slight slip or drop may have occurred in the wiring, by which one part of the scaffold was attached to the grill work. If either of these things occurred, and caused the accident, plaintiff could not recover; but we think the record contains evidence to justify the jury in coming to the conclusion that the approximate cause of the dropping of the scaffold was the slipping or lengthening of the rope, as claimed by the respondent. The evidence is not very conclusive; but the jury, under proper instructions, so found the facts, and the appellants have not convinced us that there was no evidence reasonably tending to sustain the finding.

The respondent testified positively that the plank on which he was standing dropped or moved in such a way as to throw him off his balance. He gave the following account of the way in which he was injured: "Q. What were you doing at the time of the accident? A. I bend myself down to dip the brush in the pail. Q. What happened then? A. It was a drop right under my feet. Q. What was it that dropped? A. The swing beam. Q. How far did it drop? A. I couldn't tell how far; maybe a quarter of an inch or half an inch. I couldn't tell. Q. What was the effect upon you of that drop? A. I lost my balance. Q. What did you do then? A. I was going to grab to that iron beam under the ceiling. I missed it."

One of the men who was working on the same scaffold testified to feeling the motion; but it does not clearly appear from his testimony that the motion occurred before Olson began to fall. Another workman, who was on the scaffold near the respondent, but on a different plank, testified that he did not feel the motion. The evidence of neither of these witnesses is very clear or conclusive; but, when taken as a whole, we think it is at least not inconsistent with the respond-

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ent's account of the way in which the accident occurred. No one saw the rope slip or break; but when we remember the character of the rope, as described by the various witnesses, and the way in which it was attached to the inclined rafter, we cannot say, as a matter of law, that the jury had no basis in the evidence for reaching the conclusion that the accident was caused in the manner alleged.

4. Numerous errors are assigned upon rulings of the trial court, the refusal to give certain instructions, and the giving of certain instructions to the jury. We have given them all careful consideration, but do not feel that it is necessary to discuss them in detail. Some are technically erroneous, but none can have been sufficiently prejudicial to justify a reversal. The verdict is large, but not so large as to show passion and prejudice. The injuries were very serious, and concededly are of a permanent character. In view of the fact that the trial judge has declined to set aside the verdict upon the ground of excessiveness, we feel that we would not be justified in reducing the amount.

The order of the trial court is therefore affirmed.

ERIK J. SWEDBACK and Another v. NELS L. OLSON and Others.[1]

April 8, 1909.

Nos. 15,813—(173).

County Commissioners—Vacancy in Board.

A board of county commissioners was composed of five members, each representing a district within the county. A representative of one district had failed to qualify. No steps had been taken to fill the vacancy thus arising. The power of filling such a vacancy was not vested in the board. It is *held* that four members may exercise the legislative powers of that board.

Action in the district court for Koochiching county to enjoin defendants, county commissioners and auditor of that county, from issuing,

[1] Reported in 102 N. W. 753.

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negotiating and delivering to the State of Minnesota, or to the state board of investment, or to any other party or person any bonds of that county, and from incurring any expense for the building of a courthouse. After a hearing upon an order to show cause, the order was discharged, McClenahan, J. From the order of discharge plaintiffs appealed. Affirmed.

Lind, Ueland & Jerome, for appellants.

W. V. Kane, County Attorney, and *Thomas Kneeland,* for respondents.

JAGGARD, J.

Koochiching county was created in territory previously constituting a part of Itasca county in the year 1906, pursuant to sections 380 to 387, inclusive, R. L. 1905. The proclamation required by section 386 was issued by the Governor. Nels L. Olson, Ronald McDonald, Fred Smith, Hugh T. Mackintosh, and Charles M. Bowman were the persons designated in the petition for the creation of the new county as the first board of county commissioners. They were duly elected, as appears by the Governor's proclamation. Bowman resided in the county at the time of the election and organization; but he never met with the other commissioners, and did not qualify as a member of the board. The four remaining members qualified and proceeded to act as a legally constituted board of county commissioners for the county. The vacancy caused by the failure of Bowman to qualify has not been filled. The four members who qualified adopted a resolution to issue the bonds of the county to the amount of $42,000, and were about to issue and negotiate the same, when this action was instituted by the plaintiffs, who are citizens and taxpayers, to enjoin the issue. An order to show cause why the issuance of the bonds should not be enjoined was granted by the district court and subsequently discharged. This appeal is from the order denying the injunction.

The question presented by this record is this: Where a board of county commissioners is composed of five members, each representing a district within the county, where the representative of one of the districts has failed to qualify, and where no steps have been taken to fill the vacancy thus arising, can the four members exercise the legislative power of that board?

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1. It is clear that the board itself had not the power to fill the vacancy. Under section 426, R. L. 1905, it is provided that the board of appointment to fill vacancies in the offices of the county shall consist of the chairman of the town board of each town and the mayor or president of each city and village in the commissioners' district in which such vacancy occurs. Article 5, § 4, of the constitution provides that the Governor "shall fill any vacancy which may occur in the office of the secretary of state, treasurer, auditor, attorney general and such other state and district offices as may be hereafter created by law, until the next annual election, and until their successors are chosen and qualified." It is unnecessary here to decide how the vacancy should be filled. It is clear that the power of nominating or appointing the respective district officials as to which the vacancy has occurred was not vested in the board of county commissioners itself.

2. Plaintiff has urged with great earnestness that the law contemplates that every commissioner's district shall be represented on the board, to give the board the benefit of his counsel and good judgment. This general purpose is not accomplished by leaving one district unrepresented and by permitting a vacancy on the board to continue indefinitely. Leavenworth v. Meyer, 58 Kan. 305, 49 Pac. 89, to which we are referred, tends to sustain this position. The law is, however, well settled, as Daly, J., said in Gildersleeve v. Board, 17 Abb. Pr. 201, 211, that "where, in matters of a private nature, a power is to be exercised by certain designated individuals, all must concur in its exercise, and the death, absence, or inability of any one of them, will not make the execution of the power by the remainder of them valid. (Townsend a. Wilson, 1 Barn. & A. 608; Anon., Dyer, 177). But where powers, to be exercised as a continuous public trust or duty, are confided to designated persons, the discharge of the public duty or trust is not to be interrupted or fail, through the death, absence, or inability of any of the persons to whom the exercise of it is intrusted, provided there is a sufficient number to confer together, deliberate, and, in view of the possibility of division of opinion, to decide upon what course is to be adopted; and if the power or duty is confided only to two persons, and one of them dies or is incapable of discharging it, the other cannot act alone (Pell v. Ulmar, 21 Barb. 500), because there can be no conferring together in such a case; but where, to

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prevent a failure of justice, it is indispensable that one should act alone without conferring with the other, he may do so, and the act will be valid (Rex v. Warrington, 1 Salk. 152; Naylor v. Sharpless, 2 Mod. 23; Rich v. Player, 2 Show. 286; Vin. Abm. Coroner, 7; 14 Vin., ut supra). If a public duty is intrusted to three, and one dies or is disqualified, I doubt if the others can act alone, as, in the event of division of opinion, there can be no decision; but if there is more than three remaining, the majority can decide, and if all qualified to act are notified, as was the case here, an act done by the majority of them is in my judgment valid. In this view, as there were only nine trustees entitled to act, a resolution, in favor of which five voted, was a resolution passed by a majority of the whole body as it then existed." In approving this case it was said by the court in the Matter of the Petition of Merriam, 84 N. Y. 596, 609: "The principle is well settled that where a body of officers are vested with authority to discharge public functions, death, absence, or the disability of one of them does not deprive the remainder of the power, provided there is left a sufficient number to confer together." And see People v. Harrington, 63 Cal. 257; People v. Hecht, 105 Cal. 621, 38 Pac. 941, 27 L. R. A. 203, 45 Am. St. 96; City v. Carpentier, 13 Cal. 540; Lewis v. Town, 105 Ky. 14, 48 S. W. 978; State v. Egg Harbor, 55 N. J. L. 245, 26 Atl. 89; State v. Orr, 61 Oh. St. 384, 56 N. E. 14.

The statutory provisions in force in this state accord with, if, indeed, they do not require, this rule. Thus in the third subdivision of section 5513 it is provided: "Words purporting to give a joint authority to three or more public officers or other persons shall be construed as conferring such authority upon a majority of them, unless it shall be otherwise expressly declared in the law giving the same." Section 424, R. L. 1905, applies this provision specifically to the county board. It provides in part: "A majority shall constitute a quorum, and no business shall be done unless voted for by a majority of the whole board; but less than a majority may adjourn." Gardner v. Board of County Commrs. of Dakota County, 21 Minn. 33–38.

It follows that the order of the trial court must be sustained.

Affirmed.

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EDWARD E. GEORGE v. UNIVERSITY OF MINNESOTA ATHLETIC ASSOCIATION.[1]

April 8, 1909.

Nos. 15,817—(149).

University of Minnesota—Athletic Association.

The University of Minnesota Athletic Association is a branch or department of the University of Minnesota, and is not a proper party defendant in an action of tort brought by a spectator injured by the collapse of the platform.

Action in the district court for Hennepin county to recover $5,000 for personal injuries caused by the collapse of a platform on which plaintiff was standing while watching a football game. The case was tried before Dickinson, J., and a jury which returned a verdict in favor of plaintiff for $2,000. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Reversed.

Morton Barrows, for appellant.

Larrabee & Davies, for respondent.

JAGGARD, J.

Plaintiff having paid admission to the football game between the University of Chicago and the University of Minnesota on November 2, 1907, was injured by the collapse of the platform on which he was standing. He brought this action for injuries then sustained. The principal question in this appeal is, whether the action was properly brought against defendant and appellant, the University of Minnesota Athletic Association, under section 4068, R. L. 1905. That section is as follows: "Actions against partnership, etc.—When two or more persons transact business as associates and under a common name, whether such name comprise the names of such persons or not, they may be sued by such common name, and the summons may be served on one or more of them. The judgment in such case shall bind the joint

[1] Reported in 120 N. W. 750.

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property of all the associates, the same as though all had been named as defendants."

We are of opinion that defendant was a branch or department of the University of Minnesota, and this action, therefore, does not lie. In 1905 the board of regents of the University adopted a resolution establishing the university council, which was authorized to appoint "a committee on athletics." That council is a body composed of the deans of all the faculties, together with one member for each four hundred students or major fraction thereof, and a general representative of the alumni association. It appoints a committee of five members, all taken from the different college faculties. That athletic committee, it was provided, "shall have supervision of Northrup Field, the grandstand and seats thereon. They shall satisfy themselves of the safety of all stands before allowing them to be used." It was "given entire control of University athletics, subject to the constant revision and ratification of the university council." No students were members of this committee. There was also "an athletic board of control." By resolution of the university council in 1906 it was provided "that all proposed expenditures, after being recommended by the board of control, shall be submitted for approval to the athletic committee, and no expenditures shall be made and no debts shall be incurred without such approval." That board is composed of seven student members, elected annually on vote of the student body and the professors, two faculty members elected by the council committee of five, and two members elected by the alumni association. The two faculty members were, by virtue of their office or position upon the athletic board of control, chairman of the ticket committee and chairman of the auditing committee. The action of the board of control was, however, supervised by the council committee of five, and this in turn by the university council, and this in turn by the board of regents. No student member received any salary or compensation. Members of the association could not participate nor share in any profits or receipts derived from the exhibits given. The athletic association had no stockholders and owned no property of any kind. Northrup Field, its seats, grounds, stands, and paraphernalia for conducting athletic contests, belonged to the University. The sole source of revenue is the gate receipts from athletic exhibitions. The treasurer of the University has

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always acted as the treasurer of the athletic association. He kept a separate account of these funds which were the property of the University. Any accumulations of these funds, not used for the ordinary expenses of the association, have gone to the improvement of Northrup Field; and it is proposed to use the immediate surplus for putting in swimming pools, running tracks, and other permanent improvements.

It is evident, from this statement of facts, that the board of control was a mere agency of the University. Its ultimate creator was not the students, but the regents. It owed its origin immediately to the faculty committee of five. They had the power at any time to change or abolish it. Not only did the property it used belong to the University, but also the receipts. It could contract no indebtedness and pay no bills without the approval of the faculty committee. That the student body, graduate and alumni, was given a voice, was consistent with the promotion of the distinctive purposes of the University, and in no wise tended to constitute the board of control a partnership or ordinary commercial association. The board of control resembled many organizations current in colleges and schools, whereby the authorities of the educational institution retain ultimate, absolute control, but enlist the interest, sympathy, and support of the student body by giving to members elected from it representative and limited power. Thus there are the college clubs, the title to which is in the institution, which are managed by the faculty, and yet on the house and other committees of which the students have representation. Such building is as much a part of the University as its main building. No taxes are paid upon it. Police regulations apply to it, equally and no more than to other University structures. So it often, but not always, occurs that students are given a corresponding representation in the management of military affairs in large schools. None the less the armory and other property belong to the University.

On the other hand, there are many institutions connected with the University which are purely private and subject to ordinary laws. The average college fraternity is a good example. Often it owns its own building, or rents one from private parties, which is subject to taxation as is other private property. It incurs its liabilities and is respon-

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sible for them, as is any other private organization. Teachers are usually members but in a private capacity only.

In Scott v. University, 152 Mich. 684, 116 N. W. 624, 17 L. R. A. (N. S.) 234, a spectator was injured at an athletic contest by the collapse of a stand. The trial court directed a verdict for defendant. A new trial was granted. In that case, however, it was held that the "association was simply the student in another form." The regents exercised no control of the funds of the association, except that there should be a proper auditing of accounts. There was, in brief, no testimony corresponding to that presented by this record, showing that the association was a mere agency or instrumentality of the regents.

It follows that the defendant was neither a partnership, nor a corporation, nor a voluntary association of individuals transacting business. It was a branch of the University, and was not proper party defendant.

Reversed.

START, C. J. (dissenting).

I am of the opinion that the defendant is an association of individuals under a common name to promote athletics, and as an incident thereto to give exhibitions of games for profit. The fact that its membership includes students and members of the faculty of the University does not change the essential character of the association and make it a department of the University. I therefore dissent.

ELLIOTT, J.

I agree with the conclusion reached in the opinion prepared by Mr. Justice JAGGARD. If any liability exists in this case, it rests upon the University.

LEWIS, J. (dissenting).

I dissent. The majority of the court have assumed that the university council, and not the athletic association, is the body which conducts athletic games, and transacts business with the public. This is a mistake. The foundation of the entire athletic system of the University is the defendant. According to its constitution the athletic association is composed of those members of the student body and

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faculty who subscribe to the constitution. Its officers consist of a president, vice president, and secretary. It has charge of the athletics at the University, viz., football, baseball, tennis, field and track athletics, and aquatic and winter sports. The duties of the officers are those generally performed by officers of similar associations. The "executive committee" is called the "board of athletic control," and it is given authority to conduct the business of the association. This board is composed of the officers of the association, two members of the faculty, to be chosen by the faculty, and two members of the alumni, to be chosen by the board of directors of the athletic alumni association. The officers of the association act as the officers of the board of control. The board of control selects a treasurer for the association, defines the duties of the various departments, authorizes the expenditure of the moneys of the association, audits the accounts of the treasurer, makes a report to the association, and has power to suspend or remove any department manager or captain. There are other articles defining the duties of the association, providing for meetings, how amendments to the constitution may be made, and adopting Robert's Rules of Order for its procedure. The by-laws regulate the meetings of the board of control, provide the committees to have charge of its exhibitions, and declare that the board of control shall authorize and approve all contracts and agreements on behalf of the association.

The "University Council" was established by the board of regents May 31, 1905. It consists of the president, the deans of the various schools, one representative from each college for each four hundred students, and one representative of the general alumni association. This council has authority to appoint the following committees: University auditing committee, committee on press athletics, on university relations to other institutions of higher learning, on health and sanitation, on commencement and other functions, on catalogue, programme and courses of study, and on entertainments and social affairs. The council was also authorized to appoint such other committees as the interests of the University might require, to receive reports of all committees, and make recommendations to the board of regents. In March, 1906, the council passed a resolution increasing its subcommittee on athletics to five, and providing that two of them

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should serve on the board of control of the athletic association and be represented on the auditing committee by two members. This subcommittee of five were required to pass upon the eligibility of students to participate in athletic sports and to approve expenditures proposed to be made by the board of control. The resolution directed this committee to have supervision of Northrup Field, and to satisfy themselves of the safety of the stands; and "that the methods of administering in detail the business of the athletic association shall be subject to the approval of the athletic committee; that this committee is given entire control of university athletics, subject to the constant revision and ratification of the university council."

It is clear to me that the purpose of this athletic committee, appointed by the university council, was merely to check up and to see that the business of the athletic association was properly conducted. This was done, in part, by holding office in that association. The members of the committee were members of the association. They officiated as officers of the board of control. They possessed the power of veto in certain cases; but the university council and the athletic association were two entirely independent organizations. The business of the latter was, according to its constitution and by-laws, to conduct all athletic exhibitions. To the former was delegated the authority to see that the business was properly conducted. Such was the understanding of all the parties, according to the evidence. The athletic association made all contracts with employees and for materials necessary to accomplish the purposes of its existence. The very person who put up the defective bleacher was in the employ of the association, and had been for six or seven years. It invited the public to transact business with it, and on the occasion in question the business engaged in was within its powers defined by its constitution and by-laws, and the members of the association were associates in business, within the meaning of section 4068, R. L. 1905.

That the surplus funds, after paying the expenses of the association, were used in improving the state's property, is immaterial. The result would be the same, had the money been used in leasing grounds for that purpose, or in buying and improving its own property. That the board of regents had authority to abolish athletics entirely is of no importance in determining the question. The regents have not

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deemed it proper to do so, but they have established a system of espionage over athletic sports, without attempting to engage in the business themselves.

ELLEN BRENNAN v. BUTLER BROTHERS.[1]

April 8, 1909.

Nos. 15,907—(189).

No Evidence of Negligence.

Plaintiff's deceased, while working in an areaway between the defendant's concrete mixer, in course of demolition, and a new building, about completed, was killed by a board which fell from some height. It is *held* that he did not bear the burden of showing a situation in which defendant should reasonably have anticipated harm to the deceased, and should have taken precautions accordingly.

Action in the district court for Ramsey county by the administratrix of the estate of Patrick Brennan, deceased, to recover $5,000 damages for the wrongful death of her intestate. The case was tried before Olin B. Lewis, J., who directed a verdict in favor of defendant. From an order denying plaintiff's motion for a new trial, she appealed. Affirmed.

Humphrey Barton, for appellant.

Morton Barrows, for respondent.

JAGGARD, J.

Defendant was engaged in building a seven-story building, the walls of which were up and the roof partly finished. On one side of the new building defendant had erected a temporary wooden structure, about thirty feet above the street level, on which was mixed concrete used in the erection of the building. The space between the concrete building in the street and the new building was about ten feet. Plaintiff's deceased was at work for defendant in that areaway, cleaning away the concrete which had fallen into it. The accident

[1] Reported in 120 N. W. 540.

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happened about noon. In the morning of the day the defendant put a number of men at work at the top of the concrete building to tear it down, by knocking the boards loose and throwing them into the street. While this work was going on, a board of the kind used in the construction of the concrete mixer fell and struck plaintiff's deceased, and killed him. The trial court, at the close of the testimony, directed a verdict for the defendant. This appeal was taken from its subsequent order denying plaintiff's motion for a new trial.

The only question presented by the appeal is whether the plaintiff had sufficiently borne the burden of proof of showing defendant's negligence in failing to warn deceased, or to take some precaution against his being injured by the tearing down of the concrete mixer. The trial court was of the opinion that "the question of defendant's negligence is purely a matter of speculation." This conclusion was, we think, correct. No one saw the board start, nor knew where it came from, except that it fell from some height. One man engaged in tearing down the concrete building testified, apart from his conclusions, that he saw it on its way down, going in a slanting direction from the mixer plant toward the new building, and saw it strike plaintiff's deceased. He did not, however, know from which building it came. The fair inference from the record is, in the language of the defendant's brief, that no such boards were being handled elsewhere than about the concrete mixer. A large, square box or crib was constructed by the erection of upright studdings about a foot between their centers. There were ten-inch spaces between the studdings. On the inside planks were nailed horizontally. The men engaged in taking down the mixer were directed to knock the boards loose on the inside and to throw them on the side of the structure which was opposite to the side on which the deceased was working. When they were knocked loose they would naturally be prevented from falling towards the plaintiff by the thickly set studdings and by the manner in which they were detached. How the board in question, which was two inches thick, six inches wide and about five feet long, and which was nailed at right angles to the studdings, could have escaped through the narrow spaces between the studdings, has not been made to appear. Why defendant should have anticipated that such a thing was likely to happen is left equally uncertain. There

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was some testimony that boards might have been attached to the outside of the crib; but it is too indefinite to sustain a verdict on the theory that the board which did the damage came from the outside.

The question in issue is not, however, whether a board from the mixer plant caused the injury, but whether defendant was negligent in not anticipating probable injury to plaintiff's intestate, and in not taking measures for his protection accordingly. The doctrine of res ipsa loquitur does not apply and is not urged. It is evident that no ground for the anticipation of the harm which was inflicted appears, save speculation. Plaintiff failed to bear the burden of showing initial negligence on defendant's part. The decided cases which are cited involve such different facts that their discussion here would serve no useful purpose.

Affirmed.

CORNELIUS LUCY v. TIMOTHY LUCY.[1]

April 8, 1909.

Nos. 15,922—(188).

Deed of Homestead—Estoppel.

A father, without joining his insane wife, conveyed his homestead to one son. The deed was reformed, so as to require the son to make certain payments to the father during his life, and to make other payments for the father after his death. The father abandoned the homestead, and by action secured the reformation of the deed. The son made the stipulated payments. Two years later the father made a deed to another son for the consideration of love and affection and one dollar. It is *held* that the record of the deed and other proceedings, and possession of the land by plaintiff, gave notice or knowledge of the rights of the son in possession; that the father was estopped from asserting the invalidity of the first deed; and that this estoppel operated to make that deed valid as against the son, to whom the second deed had been executed.

Action in the district court for Scott county to quiet title to eighty acres of land and to set aside and cancel a deed executed to defendant by Daniel Lucy, the father of the parties hereto, the former own-

[1] Reported in 120 N. W. 754.

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er of the land. The answer alleged that at the time of the execution of the deed the property conveyed was a homestead and no decree of court had been entered debarring the insane wife of Daniel Lucy from her right in the land or giving him authority to sell the land without her signature. That after the execution of the first deed he had abandoned his homestead. The case was tried before Morrison, J., who made findings and as conclusions of law granted the relief demanded. From the judgment entered pursuant to the findings, defendant appealed. Affirmed.

W. C. Odell, E. Southworth, and *W. N. Southworth,* for appellant.

Francis Cadwell and *F. C. Irwin,* for respondent.

JAGGARD, J.

Plaintiff and respondent and defendant and appellant were sons of one Daniel Lucy. His wife and their mother during all the time here involved was, and now is, in an insane asylum. On the sixth day of August, 1901, the father conveyed the land here involved to the plaintiff under an agreement by deed recorded a week later. After the execution of the deed, the father left the premises, which were his homestead, ceased to reside thereon, and wholly abandoned the same. Both parties agree that his homestead right then ceased. Plaintiff, after the execution of the deed, took possession of the land, and has ever since occupied it. In April 1904, a court, having jurisdiction of the premises and parties, filed an order for a decree in an action by the father against plaintiff to set aside the deed on the grounds that it had been procured by fraud and undue influence. By that decree it was adjudged that the plaintiff, after the death of the father, should pay certain sums for masses for the repose of the souls of certain persons named therein and certain legacies therein specified, and that in case the wife should recover her reason after the father's death the plaintiff should provide a good and sufficient home, care, and attention for his mother, and upon her death to provide her with suitable burial. The deed was reformed by said judgment in order to make it set forth the full agreement of the parties. Judgment was entered in accordance with the order in December, 1905. The record shows no appeal. The question of the validity of provisions as to masses is not here involved. Plaintiff agreed in the deed

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to pay the father $150 per year, during his life, to provide a good home, board, and washing upon the premises, and, in case the father did not desire to live with the plaintiff, to pay for such board and washing in addition to the yearly sum of $150. In so far as the resulting agreement imposed upon plaintiff the duty to pay sums during the father's life, he had fully complied with the terms of the agreement. On the twenty seventh day of October, 1905, the father conveyed the land by warranty deed to the defendant, another son, for the consideration of love and affection and one dollar. On the first day of December, 1905, the father returned to the plaintiff, and resided with him on the premises since that time. This action was brought by plaintiff in possession against defendant to secure an adjudication that he was the owner of the premises and to set aside the deed executed by the father to defendant. The trial court, in effect, found facts as previously stated, and ordered judgment for plaintiff. This appeal was taken from the judgment entered accordingly.

The one question argued by the defendant is this: Could the father, at the time he was occupying the eighty acres as his homestead, convey the same to the plaintiff by deed, executed while the father occupied the premises as his homestead, without the signature of his wife to that deed? This is not, as the record appears to us, the essential question on the merits.

It may be, and will be here, conceded that the original deed by the father to the son was not valid, because it lacked the wife's signature (G. S. 1894, § 5522), and that chapter 75, p. 150, of the Laws of 1891, did not operate to give effect to the deed, even as to the husband's interest. None the less the facts found by the trial court justify its conclusion. In brief, the father, without the wife joining, conveyed his homestead to one son, here plaintiff. That son agreed to make certain payments to the father during his life, and to make certain other payments for the father after his death. The deed was recorded. The father abandoned the homestead. The son made the stipulated payments. Two years later the father made a deed to another son for the consideration of love and affection and one dollar. The record of the deed and of the other proceedings, and the possession of the land by the plaintiff, gave notice or knowledge to the defendant of all of these facts. The defendant, in consequence, was estop-

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ped, if the father was estopped. It is clear that the father could not assert in equity the invalidity of the deed. The plaintiff had actually parted with considerable sums of money for the father's benefit. No offer in any form was made to return these sums. If the defendant's theory should prevail, plaintiff would, at most, have a right of action in the nature of quasi contract against the father without recourse to the land. There is good authority to the effect that a sale of the homestead, inoperative because the homestead right has not been released by both husband and wife, may be rendered valid by subsequent abandonment. Thompson, Homesteads, p. 415, § 483. And see McDonald v. Crandall, 43 Ill. 231, 92 Am. Dec. 112; Hall v. Fullerton, 69 Ill. 448. In Adams v. Gilbert, 67 Kan. 273, 275, 72 Pac. 769, 100 Am. St. 456, Cunningham, J., said:

"The husband might by his actions, words, or silence, when he should have spoken, confirm a deed to the homestead executed by himself alone, or estop himself from denying its validity, so as to make it convey title, after its homestead character had ceased, or after the death of the wife. The protection to a homestead afforded by constitutional and statutory provisions lasts no longer than the occupancy of the premises as a homestead." The ability of the wife to avoid the transfer is not here involved. Estoppel of the husband would not prevent the assertion by the wife of her homestead rights.

If this reasoning be not conclusive, defendant is clearly estopped by the judgment in the action to which the father was a party plaintiff, by which the deed was reformed and confirmed as reformed. That action was begun at a time when both parties conceded the homestead right had ceased to exist. No appeal was taken from it, nor was any motion made after the order for decree had been filed. It was after this that the father executed the deed to the defendant son. The same reasoning which is involved to convey title to defendant compels the conclusion that this judgment estopped the father from asserting title. The father was bound by the judgment, as he would have been bound by the deed, if no judgment had been rendered. If the deed could be good under any circumstances, the judgment must be good under the circumstances shown. Plaintiff was in possession. Defendant had notice of his rights, including those conferred by the judgment, independent of the fact whether or not the

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judgment was so far recorded by lis pendens or otherwise as to give defendant record notice of its existence. Barton v. Drake, 21 Minn. 299, is entirely consistent with this conclusion. In that case, as appears at the foot of page 306, the plaintiffs, who as husband and wife claimed the homestead, were in possession of the homestead premises at the time the suit was begun. If in this case the father had remained in possession with the plaintiff, it would be obviously true that the estoppel by the judgment would no more have been conclusive than the estoppel by the deed. Neither would have been of legal effect. In other words, the judgment rendered when the homestead had been abandoned bound the father as much as the subsequent deed could have, if no such judgment had intervened.

That upon the assumption here made the trial court was wrong in the reason assigned in his memorandum for his conclusion "b," namely, "that the provision of chapter 75 of the Laws of 1891, the law in force at the time of the execution of the deed," does not alter the conclusion here reached; for the validity of a right of judgment is not affected by the fact that it was rendered for a wrong reason. County of Chisago v. St. Paul & D. R. Co., 27 Minn. 109, 6 N. W. 454; Chauncey v. Wass, 35 Minn. 1, 25 N. W. 457, 30 N. W. 826.

Affirmed.

BROWN, J. (dissenting).

In my opinion a conveyance of the homestead by the husband, without the joinder of the wife, which the statutes declare shall not be valid, cannot be rendered valid, under the rule of estoppel or otherwise, by the subsequent conduct of the husband alone. Barton v. Drake, 21 Minn. 299; Law v. Butler, 44 Minn. 482, 47 N. W. 53, 9 L. R. A. 856; Murphy v. Renner, 99 Minn. 348, 109 N. W. 593, 8 L. R. A. (N. S.) 565, 116 Am. St. 418. Nor can his separate deed be validated by decree of court rendered in an action to which the wife is not a party. The homestead under our law is community property, subject to sale and conveyance only by the concurrence of both husband and wife. The property in question in this action was, at the time the wife became insane, the family homestead, and the subsequent abandonment thereof by the husband, in consequence of his

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deed to plaintiff, did not change its character as such. Montgomery v. Dane, 81 Ark. 154, 98 S. W. 715, 118 Am. St. 37, 11 Am. & Eng. An. Cas. 421, and note.

STATE ex rel. VILLAGE OF EXCELSIOR v. DISTRICT COURT OF HENNEPIN COUNTY and Another.[1]

April 14, 1909.

Nos. 16,163—(36).[2]

Inconsistent Statutes Carried into Revision.

Where two inconsistent statutes, relating to the same subject-matter, but passed at different times, are both incorporated into a general revision, the court will, in construing them, inquire as to the date of the respective enactments, and give effect to the latest expression of the legislature.

Same—Contest after Village Election.

Rule applied to sections 336 and 343, R. L. 1905, and the former *held* to extend the right of contest to village elections; the provisions of that section being the latest expression of the legislature on the subject.

On the relation of the village of Excelsior, the state obtained from the supreme court an alternative writ prohibiting the district court for Hennepin county, Honorable William H. Donahue, Judge, and the contestant, Fred W. Hawkins, from proceeding under an order of the district court directing a recount of the votes cast on March 9, 1909, on the question of issuing licenses for the sale of intoxicating liquor at the village of Excelsior. Writ discharged.

A. M. Higgins and *A. B. Jackson,* for relator.

Geo. Harold Smith, for respondent Hawkins.

BROWN, J.

At the annual election held in and for the village of Excelsior in March, 1909, the question of licensing the sale of intoxicating liquors was submitted to popular vote. A canvass of the votes cast at the election disclosed, as reported by the election officers, ninety one

[1] Reported in 120 N. W. 894.

[2] April, 1909, term calendar.

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votes in favor and ninety two against license. Thereafter a contest was instituted by an elector of the village, under section 336, R. L. 1905, and was pending and about to be brought to a final hearing in the district court, when relator sued out this writ of prohibition to restrain further proceedings in the contest, on the ground that the court had no jurisdiction to hear or determine the same; the specific point being that the right of contest given by section 336 does not extend to village elections.

Inasmuch as the writ of prohibition is an appropriate remedy only in those cases where the inferior tribunal to which it is directed is attempting to exercise an unauthorized jurisdiction, we have before us the sole question whether section 336, R. L. 1905, relating to election contests, applies to village elections. A careful consideration of the question leads to an affirmative answer.

The statute referred to provides, among other things, that: "Any voter may contest the election of any person for or against whom he has the right to vote, who is declared elected to a state, county, or municipal office, or the declared result upon a constitutional amendment or other question submitted to a popular vote, by proceeding as follows: He shall file with the clerk of the district court of the county of his residence, within ten days after the canvass is completed, a notice of appeal to such court, specifying the points upon which the contest will be made, and cause a copy thereof to be served upon the contestee when the contest relates to the election of an officer, upon the secretary of state when it is a matter submitted to popular vote which affects the entire state, or any subdivision thereof larger than a county, upon the auditor when it affects a single county, and in all other cases upon the municipality affected. * * *" This on its face manifestly includes, and was intended to include, a contest of a village election; for a village, as defined by section 154 of the statute on elections, as well as by the law generally, is a municipality, and an office therein is a "municipal office," within the meaning of section 336.

But it is contended by relator that villages and towns are expressly excepted from the operation of section 336 by the provisions of section 343. That section, a part of the election law, provides that: "The foregoing provisions of this chapter shall not apply to elections of town officers, nor, except those relating to the arrangements for voting

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at the polls and the preservation of order thereat, to village elections. * * *" This would also seem on its face to exclude village elections from the contest provisions of section 336, and to sustain relator's contention that the right to contest such elections does not exist. But the two sections are repugnant to each other, and the statutes are ambiguous and call for construction. Section 336 clearly includes the right of contest, and section 343 excludes it. To harmonize this inconsistency we must look further into the subject-matter of each section and their history, and ascertain therefrom the legislative intent.

The contest statute (section 336) has been one of growth and development. By sections 46, 49, and 52, c. 1, G. S. 1866, election contests were limited to county offices, members of the legislature, and county seat removals. Thus the statute remained until 1891, when, by section 95, c. 4, p. 58, Laws of that year, the original Australian election statute, city offices were added to the contestable list. Again the statute remained unchanged until 1905, when by the general revision of that year section 336 in its present form was incorporated into the law of the state. Prior to 1905 the statute made no provision for contesting the election of state officers, nor for judicial offices, nor for propositions submitted to popular vote, except county seat removals and changing county lines; but by the enactment of section 336, in 1905, all these, as well as constitutional amendments were provided for, and the new statute is broad and comprehensive. The change in the statute was a significant advance over prior enactments, and indicates clearly a deliberate purpose to extend the law to all elections, state, county, city, and village. Prior to the revision, "cities" were included with counties; but by the new statute the word "city" was stricken out, and the word "municipal" used in its place, thus providing that a state, county, or municipal election might be contested. This change is conclusive of an intention to extend the statute, and that a "municipal election" includes a village election there can be no serious question. So, properly construed, section 336 sustains the right of contest in this case, unless section 343 be construed as expressly taking it away.

The two sections are inconsistent with each other, but were both incorporated in the revision at the same time. As already stated, section 336, as enacted in 1905, contained many new provisions on the

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subject of election contests, and was an extension of the statute to contests not theretofore provided for, while section 343 is of long standing, having been first enacted in 1891, as a part of the Australian election law. The original purpose of this section was to exclude from town and village elections the cumbersome machinery of the new system of elections, and it had no reference to contests, for none were then provided for as to town or village elections. Bringing it forward into the new statute, without change, and in the face of the enlarged provisions of section 343, was evidently an oversight, and it must yield to section 336; for that embodies the latest expression of the legislature on the subject. The case comes within the familiar rule that where two inconsistent statutes, relating to the same subject-matter and passed at different times, are both incorporated into a general revision of the statutes, the court will, in construing them, inquire as to the date of the respective enactments and give effect to the latest legislative expression. Black, Int. Laws, § 135; Endlich, Int. St. § 183; City of Duluth v. Duluth Street-Ry. Co., 60 Minn. 178, 182, 62 N. W. 267; Long v. Culp, 14 Kan. 412; Gibbons v. Brittenum, 56 Miss. 232, 249. Section 336 expressed the will of the legislature in 1905, while section 343 goes back to 1891, and within the rule stated must yield, in so far as contests are concerned, to section 336.

We are not concerned with the propriety or wisdom of the legislation, as embodied in section 336; for such questions are purely legislative. Nor is it fatal to the validity of the statute that no provision is made, if that be a fact, for the preservation of ballots cast at village elections. Defects of that character do not go to the validity of the statute.

The point that the notice of appeal in the contest proceedings is defective and insufficient cannot be considered. If a defect of that kind exists, the objection should be raised in those proceedings.

It follows that the contest was properly instituted under section 336, the court below has jurisdiction thereof, and the writ herein must be, and it is hereby, in all things discharged.

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STATE ex rel. JOHN BERG v. VILLAGE COUNCIL OF BLACKDUCK.[1]

April 16, 1909.

Nos. 15,839—(40).

Writ of Certiorari.

A writ of certiorari should run in the name of the state, and must be directed to the court or body whose proceedings are sought to be reversed.

Same—Action of Village Council.

When it is sought to review the action of a village council in canceling a liquor license, the writ must be directed to the village council, and not to the president and the recorder of the village.

Petition to the district court for Beltrami county for a writ of certiorari directed to the president and village recorder of the Village of Blackduck to review a resolution revoking the license of petitioner to sell intoxicating liquor. An alternative writ was allowed by the court, and on the return day the writ was quashed, Stanton, J. From the order quashing the writ, petitioner appealed. Affirmed.

Charles W. Scrutchin, for appellant.

Bunn T. Willson, for respondent.

ELLIOTT, J.

The village council of the village of Blackduck, after notice and a hearing, revoked a liquor license held by the relator, Berg. On the application of Berg, what the appellant calls a writ of certiorari issued out of the district court for the purpose of bringing up the record for review. After a hearing the court quashed the so-called writ, and Berg appealed to this court.

No proper writ of certiorari was issued. What passed by that name in the proceedings was no more than a subpœna duces tecum. It was directed to certain individuals by name, who were described as the president and the recorder, respectively, of the village. The writ should have been directed to the common council of the village of Blackduck, and commanded it to make return of its proceedings in the matter of the revocation of the license. See Dunnell, Pr. § 2647.

Affirmed.

[1] Reported in 120 N. W. 894.

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SCHOOL DISTRICT NO. 131 OF FREEBORN COUNTY v. SCHOOL DISTRICT NO. 5 OF FREEBORN COUNTY and Others.[1]

April 23, 1909.

Nos. 15,945—(8).

New School District—Apportionment of Funds.

When a board of county commissioners creates a new school district out of territory taken from existing districts, as authorized by section 3674, G. S. 1894, it may make the division of the moneys, funds, and credits to the district affected by the change at a subsequent regular meeting of the board without a notice and hearing thereon.

Action in the district court for Freeborn county to recover $187.50 upon a division of funds made by the county commissioners after the organization of plaintiff district out of parts of other districts. The case was tried before Kingsley, J., who made findings and ordered judgment in favor of plaintiff in the sum of $184.50. From the judgment entered pursuant to the order, defendant school district No. 5 appealed. Affirmed.

H. C. Carlson, for appellant.

Heman Blackmer and *Morgan & Meighen,* for respondent.

ELLIOTT, J.

Under proceedings duly instituted the board of county commissioners of Freeborn county formed a new school district, known as School District No. 131, out of territory which had theretofore been included in school districts 5, 7, 23, and 82. On July 10, 1901, the matter was duly heard by the board, which on the same day made an order in writing creating the new district. The board then adjourned without day, without apportioning the funds of the different districts as required by the statute. On March 26, 1902, thereafter, at a regular meeting, the board of county commissioners made a division of the money, funds, and credits by a resolution which assigned to School District No. 131 the sum of $184.50 from School District No. 5, and other sums from the other districts from which territory had been taken. All the

[1] Reported in 120 N. W. 898.

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districts but No. 5 acquiesced in the order, and in an action brought by School District No. 131 against District No. 5 the court ordered judgment for the plaintiff, and from that judgment this appeal was taken.

The regularity of the division proceedings is not involved in this appeal, and no question is made as to the certainty and fairness of the division of funds; but the appellant contends that the board of county commissioners lost jurisdiction to make the division of property by reason of the adjournment without date after making the order establishing the new school district, and that it had no jurisdiction to make the division or award of the funds at a regular meeting held thereafter.

The statute (section 3674, G. S. 1894), in so far as applicable, provides: "At the time and place so appointed for such hearing, the commissioners, having publicly read the petition, shall proceed to consider the same, with anything which may be said by interested persons for or against granting the prayer of the petitioners. At the conclusion of such hearing, which may be adjourned from time to time, they shall cause to be entered upon the records of such board their decision, which shall be in the form of an order, etc. * * * Provided, fifth, that whenever the boundaries of any school district are changed, or any school district is divided, said commissioners shall make a division of all moneys, funds and credits * * * to the districts affected by such change, and in making such award the commissioners shall take into consideration the indebtedness, if any, of the district so divided, and shall make such division as they shall deem just and equitable."

The contention is that the interested parties are entitled, not only to be heard upon the question of division, but also on all matters required to be embodied in the order including the matters contained in the proviso; that all these matters must be disposed of at the same hearing; and that if an adjournment is taken without day the board loses jurisdiction.

We think the trial court properly held that, after the order altering the boundaries of the district had been made, the commissioners were bound to make a division of the moneys, funds, and credits of the district. The division of funds is not an essential part of the order alter-

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ing the district boundaries, and, being a duty imposed upon the board, it may be performed at any subsequent regular meeting of the board. That the board does not lose jurisdiction to make such distribution would seem to result from the decisions which hold that the board may be required to make the division at some future time, if it neglects or refuses to act at the time when the new district is created. See School District v. School District, 9 Neb. 331, 2 N. W. 712; Id., 13 Neb. 166, 12 N. W. 921; School District v. School District, 17 Neb. 177, 22 N. W. 360.

Judgment affirmed.

STATE ex rel. UNITED STATES v. DISTRICT COURT OF SEVENTEENTH JUDICIAL DISTRICT and Another.[1]

April 23, 1909.

Nos. 16,074—(273).[2]

Naturalization of Alien—Evidence.

While great caution should be exercised in the examination of applicants for citizenship, yet no hard and fast rule can be laid down. Each case must depend largely upon its special facts. The practical test is whether the evidence, considered as a whole, justifies the conclusion that the applicant will make a good citizen. An applicant, otherwise entitled to citizenship, should not necessarily be denied the right because the evidence shows that he has no accurate knowledge of the federal constitution and form of government.

At an examination of aliens desiring to obtain citizenship papers held before the district court for Jackson county, the assistant United States attorney made a motion that such papers be denied Marius Hansen, one of the applicants, because of unsatisfactory answers made by him and that he could not adequately understand the oath of allegiance or comprehend its meaning. The motion was denied, Quinn, J., and Hansen was admitted to citizenship. Thereupon the United States procured from this court a writ of certiorari. Affirmed.

[1] **Reported in 120 N. W. 898.** [2] October, 1908, term calendar.

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John C. Sweet, Assistant United States Attorney, for relator.

Naturalization is now regulated by 34 U. S. St. at Large, c. 3592, pt. 1, 596, (Act June 29, 1906); also found in 1907 Supp. U. S. Comp. St. 1901, 419, et seq. Neither this law nor any previous naturalization law provided for an appeal either by the government or by the petitioner. There is no direct appeal from a final order in such a proceeding. It is not a proceeding at common law; it is not a civil action; nor is it a special proceeding, so that any provisions of the Minnesota statute for a direct appeal would be applicable. It is not strictly speaking a proceeding of the district court of the state of Minnesota, as such, but it is a proceeding which the court may take cognizance of, (but is not obliged to do so) under the federal law and as an agency of the federal government. All state courts, "in hearing and determining applications for naturalization are exclusively under the laws of the United States and should be deemed quoad hoc courts of the United States." Holcomb, Naturalization, 21; In re Christern, 43 N. Y. Super. 523 (1878); Petersen v. State, 40 Tex. Civ. App. 175; Van Dyne, Citizenship, 64.

Under the constitution of the United States congress has exclusive jurisdiction over the subject of naturalization. Dred Scott v. Sandford, 19 How. 393; U. S. v. Wong Kim Ark, 169 U. S. 649; City of Minneapolis v. Reum, 56 Fed. 576; Van Dyne, Naturalization, 6–9. No provision of the federal statute which requires the courts or judges of the state to perform any of the duties respecting the admission of aliens to citizenship is obligatory; they may if they choose exercise the power conferred upon them by congress unless prohibited by state legislation, but this is a naked power and imposes no duty respecting the naturalization of aliens. Gilroy, Petitioner, 88 Me. 199; Holcomb, Naturalization, 29.

The powers conferred on courts to naturalize are judicial, not ministerial. In re Clark, 18 Barb. 444; Van Dyne, Naturalization, 9, and cases cited; State v. MacDonald, 24 Minn. 48; Holcomb, Naturalization, 25.

The United States may institute certiorari proceedings as the party injured by the illegal admission of an alien to citizenship. Section 11 of the naturalization act above cited specifically authorizes the United States to appear before any court exercising naturalization

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jurisdiction for the purpose of cross-examining the petitioner and the witnesses, and may call witnesses, produce evidence, and be heard in opposition to the granting of a petition. Section 4 requires the petitioner to file his petition in duplicate. Section 6 provides that the petition shall remain on file for at least ninety days, and be heard only on a regular day fixed by rule of court. Section 12 requires the clerk of the court to transmit to the Bureau of Immigration and Naturalization at Washington duplicates of all petitions within thirty days after the filing of the same. Section 10 provides for depositions in certain cases upon notice to the Bureau at Washington and the United States Attorney in the district where the witnesses reside. Section 15 provides that the United States in certain cases shall have the right to institute proceedings for the cancellation of certificates obtained either fraudulently or illegally. It is the letter and spirit of the entire statute that the United States is a party interested in seeing that the federal laws concerning naturalization are properly administered and construed by the state courts which assume jurisdiction.

START, C. J.

Certiorari to review the judgment of the district court of the county of Jackson admitting Marius Hansen, hereinafter referred to as the petitioner, an alien, as a citizen of the United States of America. The jurisdiction of state courts to hear and determine applications for citizenship under the naturalization laws of the United States is not here questioned by either party, and we assume that state courts have such jurisdiction, and that certiorari will lie on the petition of either party to review a final judgment in such a case. The petition in this case and all proceedings therein complied with the law in form and substance. The only question, then, for our consideration is whether the evidence sustains the finding and judgment of the trial court.

The contention of the relator, reduced to its lowest terms, is that the evidence is wholly insufficient to support the necessary finding that the petitioner is attached to the principles of the constitution of the United States and well disposed to the good order and happiness of the same. Whether or not the evidence is sufficient depends upon the point of view it is considered; that is, whether in a practical or a scholastic way.

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The adjudged cases, as to the character of the evidence necessary to be produced to establish that an applicant for citizenship is "attached to the principles of the constitution of the United States and well disposed to the good order and happiness of the same," are in conflict. One class of cases takes a severely logical view of the question, and holds that a person cannot be attached to the principles of the constitution and intelligently make oath to support it unless he has some general knowledge of what the constitution is and the principles which it affirms; hence the essential evidence of his attachment to the constitution is his knowledge of what it is and the principles which it affirms. In re Bodek (C. C.) 63 Fed. 813; In re Kanaka Nian, 6 Utah, 259, 21 Pac. 993, 4 L. R. A. 726. Another class takes a more practical and juster view of the question, and holds that such knowledge of the constitution and laws of the United States by the applicant is not necessarily the only sufficient evidence of his attachment to the principles thereof; but that evidence that he has behaved as a man should behave who is attached to the principles of the constitution is sufficient, if satisfactory to the trial judge, to support in this respect a judgment admitting him to citizenship. In re Rodriguez (D. C.) 81 Fed. 337; Ex parte Johnson, 79 Miss. 637, 31 South. 208, 89 Am. St. 665.

The naturalization laws do not require any educational qualification, except that the applicant must be able to speak the English language and sign his petition in his own handwriting. Nevertheless he must make it appear, to the satisfaction of the court admitting him to citizenship, that for five years immediately preceding the date of his application "he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same." Now, if there must necessarily be evidence that the applicant possesses some accurate knowledge of the constitution and our form of government in order to establish his attachment to the principles of the constitution, it would logically follow that, to establish the fact that he has behaved as a man of good moral character and as a law-abiding man, he must give evidence that he possesses some knowledge of the science of human duty and of jurisprudence.

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We are of the opinion, upon principle and authority, that while great caution should be exercised in the examination of applicants for citizenship, yet no hard and fast rule can be laid down, for each case must depend largely upon its special facts; that the practical test is whether the evidence, considered as a whole, justifies the conclusion that the applicant will make a good citizen; and, further, that an applicant, otherwise entitled to naturalization, should not necessarily be denied the right because the evidence shows that he has no accurate knowledge of the federal constitution and form of government. The sufficiency of the evidence to support the judgment in this case must be tested by the rule we have stated.

The evidence shows that the petitioner understands that our country is a republic, but tends to show that he has very little accurate knowledge of what the constitution of the United States is or of the principles which it affirms. In other respects the evidence unerringly shows that he possesses all the qualifications of a good citizen. It shows that he is forty six years of age, and was born in Norway, a country that has made large and valuable contributions to the citizenship of our state; that he has given "hostages to fortune," for he has a wife and four children, and he sends his children, who were all born in this country, to the public schools; that he came to this country twenty four years ago, and settled in Minnesota eighteen years ago, where he has followed exclusively the occupation of a farmer, and now successfully operates a rented farm of six hundred forty acres, two hundred acres of which he cultivates, and the balance is used for the stock, which consists of twelve horses and fifty head of cattle, one half of which he owns; that he speaks English fairly well, and writes; that he takes a local newspaper, which he reads occasionally; and, further, that he is and has been at all times a sober, industrious, honest, law-abiding man, possessing the respect and confidence of his neighbors. Surely such a man behaves as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same, and will make a good citizen.

Upon the whole evidence we are clearly of the opinion that it supports the judgment of the trial court, and that it should be affirmed.

So ordered.

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ELLIOTT, J. (dissenting).

The opinion of the court is unsatisfactory to me because of what it omits, rather than of what it states. I have no quarrel with the doctrines and principles stated, but I feel that the decision is a step backward. The time has gone by when naturalization papers should be granted for the asking. Recent legislation by congress has manifested an intent that the rights and privileges of citizenship should be more carefully guarded in the future than they have been in the past. If the state courts are to exercise this jurisdiction, a jurisdiction which I do not believe can constitutionally be conferred upon them by congress, it should be exercised in the spirit in which the national legislation has been enacted. The naturalization laws require more than a good character and a desire to become a citizen. They require a certain amount of intelligence and information of matters which relate to the duties of citizens. That a man has raised a large family and maintained a good reputation is not sufficient. This applicant has lived in Minnesota for twenty four years, and can continue to live here the rest of his life, under the protection of the laws and entitled to most of the rights and privileges of a citizen. To deny him his application deprives him of no right.

With citizenship goes certain political privileges, and it does not seem unreasonable to require some slight knowledge of the simplest and most elementary principles upon which the government is based. To hold that a man who believes that Washington is president, that Minneapolis or Duluth is the capital of the state, and that the laws are made by the Governor, is entitled to citizenship, would seem to me absurd, were it not for the fact that a majority of my Brethren think otherwise. The fact that he has lived in Minnesota for twenty four years makes against him, instead of in his favor, as it shows gross and culpable indifference to matters which are most intimately connected with the political duties he desires to perform. In my judgment the application should have been denied, without prejudice to the right to renew the same.

As said by Judge Dallas: "The conclusion seems to be inevitable that the court ought not to admit any alien to citizenship without being satisfied that he has at least some general comprehension of what the constitution is, and of the principles which it affirms." In re Bo-

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dek (C. C.) 63 Fed. 813. "No person will be naturalized who has not a general familiarity with the federal constitution and with our method of government, state and national. The act of congress requires each applicant to take an oath that he is attached to the principles of the constitution. No applicant will be permitted to so swear unless he knows what those principles are." In re Naturalization, 5 Pa. Dist. 597.

I am not in favor of imposing any harsh restrictions upon, or requiring any technical knowledge of the constitution from, applicants for citizenship who are otherwise qualified. But the act of congress requires that it shall be made to appear that the petitioner is "attached to the principles of the constitution of the United States and well disposed to the good order and happiness of the same," and I cannot see how a person who is so ignorant as is this man of common matters relating to the government can be said to be attached to the principles upon which the government is founded. The correct rule is stated in the recent case of In re Meakin (D. C.) 164 Fed. 334, as follows: "While it may not be impossible for one to be attached to the principles of the constitution of the United States who is without definite knowledge of the workings of the government in detail, he must have sufficient general information concerning it to enable him to give a reason for his faith; and where, as in this case, an applicant does not know how the laws are made, who makes them, nor how they are enforced, he is illy prepared to participate in the selection of the persons who shall perform those duties." As said by the supreme court of Utah: "No one should be admitted who has not sufficient intelligence to understand the principles of the government which may rest in part on his will." In re Kanaka Nian, 6 Utah, 259, 21 Pac. 993, 4 L. R. A. 726.

In view of the fact that the evidence on matters which I consider important is not alluded to in the opinion of the court, I transcribe the portion of the record referring thereto:

"Q. Do you know what polygamy is? A. No; I don't understand. Q. Well, that means marrying more than one at the same time. A. No. Q. You don't believe in anything of that kind? A. No. Q. Do you understand what it means to become a citizen of the United States? A. Yes. Q. What does it mean? A. Well, I get all the papers. Q. You know what kind of a government we have in this country? Is this a republic or a monarchy? A. A republic. Q. Who is the President

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of the United States? You don't know? A. No. Q. Where is the capital of the United States? Where are the laws made of the country? A. I couldn't tell. Q. How many years did you say you had lived in this country? Twenty five years? A. I have been in the country twenty four years. Q. Who is the Governor of the state of Minnesota? A. I don't know. Q. Where are the laws of the state of Minnesota made? Who makes the laws of the state of Minnesota? Do you know what it means to take the oath of allegiance to this country? A. No; I don't. Q. You don't know what that means? A. No; I don't. Q. Did you ever hear of the constitution of the United States? A. Yes, I heard of that. Q. Do you understand what it is? A. I don't. I ain't so much along— Q. I don't expect you to know all about it; but do you know what it is for? What it is? A. No; I couldn't explain that for you. Q. Well, if you took the oath to support the constitution of the United States, would you know what it meant? A. No; I guess— Q. You wouldn't know that?

"Mr. Sweet: We object to this applicant, on the ground that he cannot intelligently take an oath to support the government."

Examination by the court:

"Q. Don't you know who the President of the United States is? A. The President? Q. Yes; the President. A. Well, I heard it, and I know it; but I forgot his name. Q. Well, is it George Washington or Theodore Roosevelt? A. Well, they been both of them, ain't they? Q. Well, who is President now? A. Ain't it George Washington? Q. George Washington President now? A. I think. Q. No; George Washington has been dead over a hundred years. A. Well, then, it is Roosevelt. Q. Don't you know who the Governor of Minnesota is? A. Well, I heard that. I never been interested. I don't know. Q. You don't know who the Governor of the state is? A. I ain't get him. I don't remember his name. Q. Don't you know what the capital of the state of Minnesota is? A. Is it Washington? Q. Is Washington in the state of Minnesota? A. No; I guess it ain't. Q. Well, then, what is the capital of the state of Minnesota? Is it Minneapolis or Duluth or St. Paul? Or isn't it any of those places? A. It is Duluth probably. Oh, I don't know. It is Minneapolis probably. * * * Q. You think the capital of the state is either Duluth or Minneapolis? A. Yes; I couldn't say for sure which one of them. Q. Did you ever

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vote? A. I couldn't, unless I had my papers. I voted as long as the first papers was good enough. Q. You have lived here in this country twenty four years? A. Yes. Q. You say that you have heard of the constitution of the United States? A. Yes. Q. What is that? A. That I can't— I couldn't— Q. What is it about? Do you know where the laws of Minnesota are enacted? Where they are passed? Where they are made? Where do they make the laws that govern this state? A. No; I don't know. Q. Do you know who it is that makes the laws? Who is it that helps to make the laws? Do you know? A. I guess the Governor. Q. The Governor? A. Yes; don't he? Q. You don't know who the Governor is? A. No; not— Q. Did you ever read about it in that paper, the Heron Lake News? A. No. Q. Now, as a matter of fact, do you read that paper any yourself? A. Well, I read it. I never read any about that. * * * Q. Do you own a farm? A. No; I rent a farm. Q. You are married? A. Yes. Q. How many children have you got? A. Four. Q. They go to school? A. Yes. Q. How old are they? A. The oldest one is fourteen. Q. How old is the youngest? A. The youngest is three. Q. Do they go to school all the time? A. Yes. Q. You live on a rented farm? A. Yes, sir.

"The Court: Well, that is all for the present.

"Mr. Knox: Your honor, I don't wish to interfere; but from what I know of this man—he is an old resident up there—I think the man is somewhat rattled. I think if your honor will examine some of his witnesses, his neighbors up there, he will get a more satisfactory result. I don't think he is so dull as he appears."

Examination by the court:

"Q. Do you know who I am? A. Yes. Q. What is my name? A. Well, your first name I don't know, but I know what your business is. Q. What is my last name? A. Well, you are the one what we have to decide cases before, Judge Quinn. Q. Yes; well, you don't need to feel annoyed here. We want to examine you to find out how well qualified you are to receive these papers. Now don't you know who the President of the United States is at the present time? Don't you know who the President of the United States is? Now, think about it. Suppose one of your children should come to you today and ask you who the President of the United States was, couldn't you tell them?

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A. No; I don't think I would know for sure. Q. Well, couldn't you tell them who the Governor was? Couldn't you tell who was the Governor of Minnesota now? Couldn't you tell one of your children, if they came and asked you today, who the Governor of this state was now? A. I could tell them it was Roosevelt. Q. No; Roosevelt isn't Governor. Roosevelt is President of the United States. Now, who is Governor of the state of Minnesota? A. No; I couldn't. Of course I never read anything about it. I never asked anybody about it."

Comment seems unnecessary.

MARTIN I. LANNON v. JOSEPH RING.[1]

April 23, 1909.

Nos. 16,081—(146).[2]

Poll List—Evidence.

The poll list, a record of the names of voters made by election officers during the progress of the election as they appear and cast their ballots, is, in the absence of clear proof to the contrary, conclusive of the names and number of persons who voted.

Loose Ballot.

A ballot found in the ballot box by referees appointed in contest proceedings to recount the ballots cast at a particular precinct, which was not attached to the string of ballots counted by the officers of the election, and which, if counted, exceeded the number of ballots cast as shown by the poll list, *held*, in view of the facts stated in the opinion, not sufficiently identified as a lawfully cast ballot.

Ballot—Erasure—New Marks.

A voter appears to have properly marked his ballot for contestant, and then attempted to obliterate the same by means of other pencil marks or scratches, concluding his efforts by placing a proper mark after the name of contestee. *Held* properly counted for contestee, under subdivision 8, § 302, R. L. 1905.

Marks of Identification.

Similar marks and erasures opposite the names of other candidates *held* not marks of identification.

[1] Reported in 120 N. W. 1082. [2] April, 1909, term calendar.

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Proceeding in the district court for Scott county to contest the election of Joseph Ring to the office of county commissioner of the Fifth commissioner district for that county, instituted by one Martin I. Lannon. The matter was heard before Morrison, J., who made findings and as conclusion of law found that both candidates received an equal number of votes for the office of county commissioner, by reason of which there was a tie and the title to the office was to be determined by lot in the office of the county auditor as provided by section 422, R. L. 1905. From an order denying the motion of contestee, Joseph Ring, to amend the findings of fact and conclusions of law or for new trial, he appealed. Reversed and new trial granted.

F. J. Leonard, for appellant.

Julius A. Coller and *E. Southworth,* for respondent.

BROWN, J.

Contestant and contestee were rival candidates at the late general election for the office of county commissioner of the Fifth commissioner district of Scott county. The official count of the ballots cast for each disclosed a majority of three for contestee, and he was duly declared elected. Whereupon this contest was instituted, in and by which the official count in one of the election districts, the town of Newmarket, was challenged. Issue was joined, and the matter came on for trial before the court below, at the conclusion of which the court found that each candidate had received an equal number of votes, and it was ordered that the title to the office be determined by lot, as prescribed by section 422, R. L. 1905. Contestee thereafter moved for a new trial, and appealed from an order denying it.

Appellant's assignments of error present for consideration the correctness of the rulings of the trial court in counting a disputed ballot for contestant and refusing to count two disputed ballots for contestee. Respondent, contestant, challenges the correctness of a ruling of the court in counting a disputed ballot for appellant, contestee; but this ruling is not properly before the court, for contestant took no appeal from the decision of the court below. The question raised will, however, be considered, for a decision thereof will in all probability end the contest.

In view of the result necessarily following our conclusion respecting two of the contested ballots, viz., the one counted for contestee, Ex-

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hibit E, challenged by respondent as just stated, and that counted for contestant, Exhibit B, it becomes unnecessary to consider Exhibits C and D, which contestee contends should have been counted for him. We are not agreed upon the question whether those ballots were valid under the statutes; and, it being unnecessary to determine the question, we pass it without further remark.

We come, then, directly to Exhibit B, counted for respondent, and which contestee insists was error. After the commencement of the contest the court below appointed referees to examine and recount the ballots cast in this particular precinct. They found the ballot box in proper condition, and opened and removed therefrom the ballots which had been strung together by the officers of the election at the time of the official count, and immediately discovered an extra ballot at the bottom of the box, which had not theretofore been counted and was not attached to those previously canvassed. This was an official ballot, and was marked with an X opposite the name of contestant, and was properly counted for him, if duly cast by an elector. We are of opinion that the court erred in counting this ballot. Its integrity as a lawfully cast ballot, under the evidence is too doubtful to extend to it a place among those rightfully cast. The facts as disclosed by the record, are as follows:

According to the poll list, a record of the names of the electors made up by the clerk of the election as they appeared at the polls to vote, there were 286 votes cast, and that number of ballots was canvassed, counted, and preserved by the election officers. As canvassed they were strung together, and at the conclusion placed in the ballot box, which was then sealed and locked, as required by law. Just how this extra ballot came in the box is not made clear by the evidence. At the close of the polls one of the judges removed the cover from the ballot box and took therefrom all the ballots contained therein. He placed his hand in the box, after he supposed he had removed all of them, and "felt around" for more, but found none. The associate judge, for the purpose of making certain that all the ballots had been removed, placed his hand in the box in search of ballots. He found none, and he then took the box, turned it bottom side up, and shook it, and he testified on the trial that he was confident that no ballot was left therein. The officers then proceeded with the count, leaving the un-

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covered box on the floor, at one end of the table on which they were at work, and where lay the unused block of official ballots. The canvass was completed at seven o'clock the following morning, when the counted ballots, as already stated, were returned to the box, attached together as required by law. During the canvass of the ballots bystanders were permitted to remain in the room; but there is no direct evidence that the ballot in question was clandestinely marked and placed in the box at some time during the night.

The fact that the number of ballots counted corresponds with the number of names on the poll list made as the election progressed, the care taken by the officers to remove from the box all ballots therein, and the opportunity afforded some mischievous or corrupt bystander to prepare this particular ballot and place it in the box unbeknown to the officers, so cloud the honesty of the ballot as to require it to be rejected. It is a significant fact that, when found in the box by the referees, the ballot was not folded as ballots are usually when deposited in the box from the hands of the voter, but lay flat on the bottom of the box. It bore evidence of having been folded at some time, but when found by the referees it was not in that condition. The record furnishes no suggestion of fraud nor incompetence on the part of the judges and clerks, although they may have neglected some of the details pertaining to their duties. On the whole, the election was conducted honestly and in substantial compliance with the statutes. In view of these facts, we are of the opinion that the presumption that election officers do their full duty and that their returns are conclusive, in the absence of clear proof to the contrary, is not sufficiently overcome by the evidence to give validity to this particular ballot. Though the poll list was not kept in all respects as required by law, there was no attempt to show error or mistake in recording the names of the voters as they appeared and cast their ballots.

It follows that the court erred in counting this ballot for contestant, and there must be a new trial, in view of which we deem it proper to say, inasmuch as the decision will probably end the contest, that Exhibit E was properly counted for contestee. As heretofore stated, this question is not strictly before the court; but it was argued by counsel for respondent, and, for the reason stated, we determine it. The voter casting that ballot seems to have made the proper mark opposite the

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name of several candidates, and then attempted to obliterate them by means of other pencil marks or scratches, after which he placed a proper mark opposite the name of another candidate for the same office. Such was the condition of the ballot following the name of the contestant and contestee. The mark opposite contestant's name had been erased in the manner stated, and the proper mark placed opposite the name of contestee. We think the court properly counted this ballot for contestee. It comes within the scope and purpose of subdivision 8, § 302, R. L. 1905, which provides that "when a ballot shows that marks have been made against the names of two candidates, and an attempt made to erase one of such marks, it shall be counted for the candidate for whom it was evidently intended." The evident intention of the voter of this ballot was to cast it for contestee, and of this we have no serious doubt. Nor do we concur in the contention of contestant that the erasures were intended as marks of identification.

For the reasons stated, this disposes of all questions requiring consideration, and the order appealed from is reversed, and a new trial granted.

EBEN G. ALTON v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.[1]

April 23, 1909.

Nos. 16,082—(79).

Memorandum of Trial Court.

Held, following Kipp v. Clinger, 97 Minn. 135, that a memorandum not made a part of an order granting a new trial, which in itself is clear and positive, may not be referred to for the purpose of impeaching the order or overcoming the effect thereof.

New Trial—Insufficient Damages.

The evidence in this case justifies the order of the trial court granting a new trial on the ground that the damages awarded by the verdict were insufficient.

[1] Reported in 120 N. W. 749.

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Action in the district court for Ramsey county to recover $30,000 damages for personal injuries sustained while in the employ of defendant railway company. The case was tried before Orr, J., and a jury which returned a verdict in favor of plaintiff for $3,450. From an order granting plaintiff's motion for a new trial on the ground of inadequate and insufficient damages, defendant appealed. Affirmed.

F. W. Root and *Nelson J. Wilcox,* for appellant.

Barton & Kay, for respondent.

START, C. J.

This is an appeal by the defendant from an order of the district court of the county of Ramsey granting the plaintiff's motion for a new trial in a personal injury action. The plaintiff sustained serious injuries while in the discharge of his duties as a brakeman in the employ of the defendant at a point on its Wisconsin Valley Division in the state of Wisconsin. He was riding, at the time he was injured, on a caboose, from which he was thrown by the train, to which it was attached, colliding, by reason of the defendant's alleged negligence, with two cars standing on the same track. There is no substantial conflict in the evidence as to the extent and permanency of the injuries sustained by the plaintiff as a result of such injuries. His left leg was so broken and crushed that it was necessary to amputate it above the knee and some seven inches below his body. He sustained a compound fracture of the kneecap of his right leg, with an opening into the knee joint also, a fracture of the anterior brim of the pelvis on the right side, and he was cut on the right cheek and bruised on his right forearm and over his heart, which interferes to some extent with his breathing. The injuries to his right leg prevent the free use of his knee and hip joints, and have so weakened the leg that it is not strong enough to hold him up, which will necessitate his using crutches so long as he lives. The injury to his right forearm has impaired to some extent the normal strength of his hand.

He claimed, in his complaint, $30,000 damages on account of his injuries. The jury gave him a verdict for $3,450. Thereupon a motion was made on his behalf for a new trial for the following reasons: "(1) Insufficient damages, appearing to have been given under the influence of passion and prejudice. (2) That the verdict is not justified by the evidence and is contrary to law." The trial court made its

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order granting a new trial, which was in these words: "This cause came on for hearing upon plaintiff's motion for a new trial herein on the ground of inadequate and insufficient damages. Now, after consideration of the argument of counsel, it is ordered that said motion be and the same is hereby granted." Attached to this order was a memorandum, which the court did not make a part of its order, in which the court made, with others, the statements following: "* * * There is nothing to indicate the presence of passion or prejudice herein, and the court does not find the existence of any passion or prejudice in the verdict returned. But the verdict for the plaintiff established the defendant's liability, and the jury was thereupon bound to give adequate and reasonable compensatory damages. * * * I am clearly satisfied that, in view of the serious injuries which the plaintiff sustained herein to both of his legs, impairing his ability to earn a competency, the verdict is not reasonably compensatory, and for that reason a new trial is granted."

The contention of the defendant is to the effect that the memorandum in this case must be taken as a part of the order, and amounts to a finding that the award of damages was not made under the influence of passion or prejudice. Therefore it was plainly error for the court to order a new trial on the ground of insufficient damages, because in a personal injury case it is only where it appears that excessive or insufficient damages were given under the influence of passion or prejudice that the court is authorized to grant a new trial for the reason that the damages are either excessive or inadequate. The case of Nelson v. Village of West Duluth, 55 Minn. 497, 57 N. W. 149, is relied upon in support of the contention. The case cited has been criticised and limited. See Mohr v. Williams, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N. S.) 439, 111 Am. St. 462, and Ford v. Minneapolis St. Ry. Co., 98 Minn. 96, 107 N. W. 817.

If it be conceded, for the purpose of this appeal only, that in a personal injury case, where the evidence shows that the damages awarded are not reasonably compensatory, the trial court is powerless to correct the injustice by granting a new trial, unless it appears that the verdict was given under the influence of passion and prejudice, we are nevertheless of the opinion that the order granting a new trial in this case must be affirmed; for the order was a discretionary one, unless the

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memorandum is to be taken as an essential part of the order. The general rule is that a memorandum of the trial judge is no part of the order or finding to which it is attached, unless expressly made a part thereof; but, whether attached or not, it may be referred to where the order or finding is not explicit in itself for the purpose of interpreting the meaning thereof. The memorandum, however, unless expressly made a part thereof, may not be referred to for the purpose of impeaching the order or finding or overcoming the effect thereof. Johnson v. Johnson, 92 Minn. 167, 99 N. W. 803; Holland v. Great Northern Ry. Co., 93 Minn. 373, 101 N. W. 608; Kipp v. Clinger, 97 Minn. 135, 106 N. W. 108.

The order granting the new trial in this case is clear and positive, and its correctness must be determined without reference to the memorandum, which is no part of it. The evidence justifies the order granting a new trial.

Order affirmed.

STATE ex rel. WILLIAM DEVINE v. LOUIS H. PETER and Another.[1]

April 23, 1909.

Nos. 16,145—(38).

Claim against County—Power to Rescind Action.

Held, construing R. L. 1905, § 620, that when a board of county commissioners has once deliberately acted upon a claim against a county and definitely allowed or disallowed it, so that the time for appeal therefrom has begun to run, it cannot thereafter, at least in the absence of fraud or mistake and notice of hearing, set aside its decision and take some other action thereon.

On petition of relator the district court for Ramsey county granted an alternative writ of mandamus directing Louis H. Peter as acting chairman of the board of county commissioners and Edward G. Krahmer to issue a county warrant to the relator for the sum of $1,114.80 on a claim audited and allowed by the board. The court, Brill, J.,

[1] Reported in 120 N. W. 896.

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made the writ peremptory. From the judgment entered pursuant to the order, respondents appealed. Affirmed.

Richard D. O'Brien and *Patrick J. Ryan,* for appellants.

O. H. O'Neill, for respondent.

START, C. J.

Appeal by the defendants from a judgment of the district court of the county of Ramsey adjudging that peremptory writ of mandamus issue directing them, respectively, as acting chairman of the board of county commissioners and county auditor, to issue to the relator a warrant upon the county treasurer for the sum of $1,114.80. There is no substantial controversy as to the facts, which are as follows:

On August 14, 1907, a contract was duly entered into between the relator and Ramsey county for the macadamizing of Rice street, a county road, by the relator, for the sum of $7,432, to be paid on estimates to be approved by the county board and surveyor. The contract provided that fifteen per cent. of the contract price was to be withheld until the work was fully completed and accepted by the surveyor and board. The work was completed, as the relator claimed, and the contract price paid on estimates, except the fifteen per cent. reserved until the work was finally completed and accepted by the surveyor and board. On May 4, 1908, the relator, asserting that he had fully completed his contract, made and presented his verified claim for the unpaid fifteen per cent. of the contract price, $1,114.80, to the county board. The county surveyor duly approved the claim, and the board on that day duly audited, approved, and allowed the claim, and ordered the payment thereof; the same being the balance due upon the contract price of the work. No appeal was ever taken from the order allowing the claim. The relator duly demanded of the appellants herein the warrant for the payment of the claim so allowed, which was refused. On May 18, 1908, the county board, without any notice to the relator, passed a motion reconsidering their action allowing the claim and nothing since has been done in reference to allowing or disallowing the same. The board did, however, on June 29, 1908, pass a motion ordering the relator to perform certain work on the road, which it was claimed was necessary to the completion of the contract. The relator did not comply with the order.

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The question for our decision is: Do the facts stated justify the order and judgment of the trial court directing the appellants to issue and deliver to the relator a warrant in payment of his claim? The board, in auditing and allowing the claim of the relator for the fifteen per cent. of the contract price, which was not payable until the work was finally and fully completed, and accepted and approved as provided by the contract, necessarily found that the contract had been completely performed. There is nothing in the record which would justify any inference that the action of the board in allowing the claim was the result of either fraud or mistake. Whether the board, if the allowance of the claim was the result of fraud or mistake, might have reconsidered its action, after notice to the relator and a hearing, is not a question involved in this appeal; for the sole question is whether the board had the right to reconsider its action under the precise facts of this case. The statutory provisions relevant to the question are the sections of R. L. 1905, following:

Section 434, subd. 1: The county board shall have power: "to examine and settle all accounts of the receipts and expenses of the county, and to examine, settle, and allow all accounts, demands, and causes of action against the same, and, when so settled, to issue county orders therefor, as provided by law."

Section 440: "Whenever any account, claim, or demand against any municipality shall have been verified in the manner prescribed in this subdivision, the board or officer to whom it shall be presented may receive and consider it, and allow or disallow the same, in whole or in part, as shall appear just or lawful; saving to the claimant the right of appeal."

Section 415: "When any claim against a county is disallowed by the board in whole or in part, a claimant may appeal from its decision to the district court by causing a written notice of such appeal to be filed in the office of the auditor within fifteen days after the decision appealed from was made, and giving security for costs, to be approved by the auditor, who shall forthwith notify the county attorney thereof. When any claim against a county shall be allowed in whole or in part by such board, no order shall be issued in payment of the same or any part thereof until after fifteen days from the date of the decision; and

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the county attorney may in any case, and if the amount allowed exceeds twenty-five dollars, upon request of seven taxpayers of the county, he shall, on behalf and in the name of such county, appeal from such decision to the district court, by causing a written notice of such appeal to be filed in the office of the auditor within fifteen days after the date of the decision appealed from."

Section 620: "No action shall be maintained against a county upon any claim except county orders, when the only relief demanded is a judgment for money, until such claim shall have been duly presented to the board, and it shall have failed to act upon the same within the time fixed by law, or unless such board shall consent to the institution of such action."

This last provision was added to our statutes by the Revision of 1905. Before its enactment this court had held that the remedy by appeal from the disallowance of a claim by the county board was not exclusive, and that, notwithstanding the disallowance of the claim by it, an original action could be maintained for its enforcement. Murphy v. County Commrs. of Steele Co., 14 Minn. 51 (67); Gutches v. County of Todd, 44 Minn. 383, 46 N. W. 678. This change in the law is significant, as it makes the affirmative action of the board upon a claim against the county final, unless an appeal is taken from its decision within the time allowed by law, and, in connection with the other provisions referred to, gives to the board quasi judicial capacity to decide the merits of claims against the county, subject to the right of either party to appeal from its decisions. Our present statutes make it clear that the board of county commissioners, in passing upon claims against the county and allowing or disallowing them, acts quasi judicially, and that when it has once finally acted, without fraud or mistake in the premises, upon a claim its action is final and binds the parties, unless there be an appeal, and, further, that its power to deal with the claim is exhausted. Ryan v. County of Dakota, 32 Minn. 138, 19 N. W. 653; State v. District Court of St. Louis County, 90 Minn. 457, 97 N. W. 132.

We therefore hold that when a board of county commissioners has once deliberately acted upon a claim against a county, and definitely allowed or disallowed it, so that the time for appeal therefrom has be-

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gun to run, it cannot, at least in the absence of fraud or mistake and notice of hearing, set aside its decision and take some other action thereon.

Judgment affirmed.

JAGGARD, J. (dissenting).

I respectfully dissent. The act of the county board was not judicial in the sense that the actions of a court are judicial, but only in the sense that the action of a private individual or any private corporation, passing upon a controverted liability, is judicial or quasi judicial. The fact that a board of officers "has, in the performance of their duties, to ascertain facts, and, in doing so, to determine what the law is, does not of itself render the acts judicial. That has to be done every day by public bodies and officers, in the discharge of purely legislative or executive acts." State v. Clough, 64 Minn. 378, 67 N. W. 202. And see State v. Village of McIntosh, 95 Minn. 243, 245, 103 N. W. 1017.

The county board bears no resemblance to a court. The commissioners were not judges. They were not impartial, disinterested third persons, charged with the determination of other people's controversies. The board was one of two parties to a contract. It was engaged in determining whether that contract had been performed. There was no trial. The contractor was given a hearing, just as he might be before a board of directors in a private corporation. The resolution was not a judgment, in form or in substance. The board is a public body, which may act in its business or in its public capacity. Here it was acting solely in its business capacity. It was a board of directors of a municipal corporation, who had let a contract, and who afterwards passed upon a dispute as to the performance of that contract. It was not bound by its initial conclusion. It had the same right to change its mind that the board of directors of a private corporation has. Its action may have been an admission against interest, in case a lawsuit resulted; but it would not conclude the board. There is no reason for putting it in a less favorable position in the correction of mere commercial, not legal, mistakes than the board of directors of a private corporation with respect to purely business affairs. That the statute prescribed an orderly method for the transaction of business and time of an appeal has no bearing on the controversy.

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W. G. CALDERWOOD v. JOS. SCHLITZ BREWING COMPANY and Another.[1]

April 30, 1909.

Nos. 15,867—(146).

Action to Recover License Money Refunded—Curative Act.

Plaintiff, a taxpayer, sought to recover from defendant brewing company judgment in favor of defendant city for money alleged to have been taken illegally by city officials from its funds and paid to respondent brewing company. Under an ordinance alleged to have been invalid, the owner of a liquor license was permitted to surrender it and to have it revoked by public officials; and upon such revocation the owner became entitled to have returned to him the proportionate part of the fee which had been paid for the license corresponding to the unexpired term. The refunded moneys were paid to the defendant brewing company, pursuant to written power of attorney, signed by the license owner, or to oral authority given by him. Upon the assumptions that the ordinance was invalid, and that no estoppel prevented the restoration to the city of refundments actually paid, it is *held* that:

1. The appeal should be determined upon the merits, notwithstanding objections to assignments of error not entirely technical.

2. A subsequent curative act, which provided that "in all cases where the officers of any city in this state having a population of over fifty thousand inhabitants have heretofore in good faith paid out public moneys to any person whose license to sell intoxicating liquors in such city has been revoked, or to his assigns, for the purpose of refunding to such person, or his assigns, any portion of the fee paid for such license, such payments are hereby in all respects validated and legalized," was not invalid as special legislation. State v. Brown, 97 Minn. 402, followed and applied.

3. That curative act was valid within the rule that, unless there be a constitutional inhibition or an interference with a vested right, the legislature has power to validate invalid contracts or ratify and confirm any act it might lawfully have authorized in the first place.

Here the power of the legislature to legalize was the same as its unquestionable power to have originally authorized; the city had received an exact equivalent in cash for the transaction legalized; and no vested right was impaired.

[1] Reported in 121 N. W. 221.

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4. The findings of the trial court brought this case within the terms of the act, and showed good faith on the part of the city officers who had "paid out public moneys" to persons there designated in accordance with its requirements.

Action in the district court for Hennepin county against defendant brewing company and the city of Minneapolis to recover $26,511.17 for money alleged to have been illegally refunded by defendant city to defendant brewing company on account of unexpired liquor licenses. The defenses alleged are stated in the third paragraph of the opinion. The case was tried before Holt, J., who made findings and ordered judgment in favor of defendants. From the judgment entered in favor of defendant brewing company, plaintiff appealed. Affirmed.

Charles W. Purple and *Frank W. Booth,* for appellant.

Welch, Hayne & Hubachek and *Frank J. Geist,* for defendant brewing company.

Frank Healy, for city of Minneapolis.

JAGGARD, J.

Plaintiff and appellant, as a taxpayer, demanded judgment against respondent brewing company, and in favor of defendant city of Minneapolis, for money taken illegally by the city officials from the funds of the city and paid to respondent brewing company. In April, 1889, the city passed an ordinance to license and regulate persons dealing in intoxicating liquors. Of this ordinance section 12 provided in effect that every license was granted with the distinct understanding that it could be forfeited by the mayor and city council at any time, and by the court upon conviction of a violation thereof by the holder; that the city should refund to the holder "one-half the fee corresponding to the unexpired term" in the event of revocation by mayor or council; and that the whole sum should be forfeited in case of revocation by the court. In 1892 this was amended to provide that on revocation the full amount should be refunded to the licensee by the city. In 1905 the section was again amended by adding a proviso to the effect that any owner of such license might surrender it and have the same revoked by the mayor or city council, and upon such revocation should be entitled to have the proportionate part of the fee paid for the license corresponding to the unexpired term. The payments covered a period

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of about three years, when they were stopped by an injunction as illegal.

The complaint set forth a large number of distinct causes of action, on account of substantially identical transactions, and prayed judgment in the sum of $26,511.17. As to each cause of action it was set forth that the person mentioned therein procured a license; that the mayor revoked the license and notified the city comptroller; that the city comptroller, in accordance with the ordinance, made out a claim against the city for refundment of the money in favor of the licensee for the unexpired term of the license; that the claim was regularly presented to and allowed and ordered paid by the council, and the refundments were accordingly made. When the license was issued, the licensee signed a power of attorney or assignment of the refundment to the brewing company, authorizing it to surrender the license and to receive the moneys that became payable thereon, and to indorse the licensee's name on any warrant or other instrument issued for said money. In many instances the refundments were made by the city to the brewing company in pursuance of this power of attorney. Where this was not done, the warrants were delivered to the brewing company pursuant to oral authority authorizing the brewing company to collect and receive the refundments. The licensees did not own the buildings covered by their licenses, but were the tenants of an officer or stockholder of the brewing company. The agent of the brewing company was the agent of the landlord. The tenants, in addition to paying the rent monthly, also paid monthly payments to apply on the money advanced by the company for the license fees.

The defendant in its answer (1) denied that the taking was illegal, and asserted that if it was (2) plaintiff was estopped by his laches from demanding its restoration, and (3) in any event the transactions had been validated by legislative enactment. The court below found the defendants correct in the second and third contentions.

1. The defendant urges that the assignments of error are insufficient to present any controversy for determination. The difficulty in the situation is aggravated by the peculiarities of the record. The record contains only the complaint, answers, reply, findings of fact, and conclusions of law, application for liquor license, affidavit for liquor license, bond certificate of liquor license, memorandum, judgment, and

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notice of appeal, and statement of license refund. It does not purport to contain the testimony received, nor motions concerning the findings of fact, which may or may not have been made; and it must be admitted that, under these circumstances, considerable embarrassment is created when assignments of error as to the adequacy of findings of fact and the sufficiency of the evidence to support them come to be considered. None the less, in view of the importance and public character of the questions involved, and of the tendency of current practice to consider the merits of an appeal, and not to dispose of it on mere technicalities, we feel constrained to overrule the defendant's objection.

2. It will be here assumed that the ordinance was invalid, and that the estoppel asserted by defendant was no defense. Plaintiff's argument that chronic felony is not a basis for equitable estoppel is striking; but the authorities cited by defendant raise great doubt as to whether a taxpayer, on behalf of the city, years after the transaction in question has been completely executed between the city and the licensee, can recover the refundment to which the latter became entitled under the conditions of the ordinance pursuant to which the application for the license was made and the license granted and a new license fee was received immediately upon such refund from a new license, issued in lieu of the one revoked, and as to whether the money can be recovered from the defendant brewing company, which became the purchaser of the warrant. It subserves convenience, however, to proceed to the consideration of the case upon the assumptions stated.

3. The propositions upon which the decision will be rested concern the validity and effect of chapter 15, p. 14, Laws 1907. That act is as follows:

"That in all cases where the officers of any city in this state having a population of over fifty thousand inhabitants have heretofore in good faith paid out public moneys to any person whose license to sell intoxicating liquors in such city has been revoked, or to his assigns, for the purpose of refunding to such person, or his assigns, any portion of the fee paid for such license, such payments are hereby in all respects validated and legalized."

Plaintiff contends that the act is in no sense curative or remedial, and refers us to a number of cases in which retrospective statutes have been held invalid. It is entirely clear that the law purports to be cur-

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ative. The only question in issue, then, is whether or not it is valid. The following reasons are assigned for holding it unconstitutional: (1) That it is special legislation; (2) that it contravenes article 1, § 8, of the constitution, which guarantees to every man a certain remedy in law for every damage to person, property, or character; (3) that it destroys a vested right; (4) that it involves an imposition of taxes for other than public purposes; (5) that it takes property without due process of law; and (6) that it impairs the obligation of contract. These objections are really two: First, that the law violated the constitutional inhibition as to special legislation; second, that it was void for other reasons closely allied to each other, which for purposes of convenience will be considered under the common name—impairment of vested rights.

First. To the constitutionality of the law as special legislation the gist of plaintiff's objection is this: "Here it is sought to make it depend upon the coincidence of two artificial and unrelated conditions, living in a town of a certain size and the good faith of some one else, of whose mental processes and state of heart he can, of course, have no knowledge or control." Exactly who is meant by "he" in this connection is not clear. "He" cannot refer to the legislature, because the legislature does not undertake to determine. It must then refer to the courts; and it is elementary that good faith is one of the issues constantly and properly determined by judicial tribunals. While the argument is not clear, it may fairly be construed to mean that the law is void because it contains "twofold limitations, which are generally found as leading features in all special acts which have come to grief in our country." The argument does not justify the conclusion. Many acts containing twofold limitations have been declared to be special in character, and many of them have been upheld by the courts.

Article 4, § 36, of the constitution of this state, authorized the legislature to regulate the affairs of cities of a stated number of inhabitants by a general law, if it applied equally to all cities of the given classification. In State v. Westfall, 85 Minn. 437, 439, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. 571, Chief Justice Start said: "Courts ought never to be unmindful of the fact that the lawmaking power is vested in the legislature. Therefore, if there be any facts fairly calling for the exercise of legislative discretion in the classification of particular

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subdivisions of the state for the purposes of legislation, courts cannot review such discretion, and declare statutes making such classifications invalid, simply because they differ with the legislature as to the propriety of the classification. It is only when the classification is so manifestly arbitrary as to evince a legislative purpose of evading the provisions of the constitution that the courts may and must declare the classification unconstitutional." How such intention to evade appears in the law here in question has not been made clear. Certainly the four authorities cited by plaintiff do not tend to show that the law is unconstitutional. In State v. Justus, 90 Minn. 474, 97 N. W. 124, the law which required journeymen plumbers to take examinations and procure a certificate of competency was held unconstitutional because of the adoption of arbitrary bases of classification. In the first place the application of the act was restricted to cities of ten thousand inhabitants which have a system of sewers or waterworks, and in the second place an unjustifiable distinction was made between the master plumbers and the journeymen plumbers.

There is obviously no analogy between that case and the case at bar. This is equally true of Hetland v. Board of County Commrs. of Norman County, 89 Minn. 492, 95 N. W. 305, where the operation of an act was limited to such counties as had at the time of its passage expended $7,000 for courthouse property.

Thomas v. City of St. Cloud, 90 Minn. 477, 97 N. W. 125, resembles State v. Justus. The classification includes cities which have owned a system of waterworks and sold or disposed thereof, and which have reserved the right by contract or otherwise to purchase the same. The basis of the classification was properly held to have been so narrow, restricted and peculiar that the inference is unavoidable that the law was not intended to be general in its operation. So in State v. Ritt, 76 Minn. 531, 79 N. W. 535, the act was void because "the essential provision of this act and the one which was designed to differentiate counties falling within its purview is the one providing for one assessor for the whole county, instead of an assessor in each township, city and village, as provided in the then existing general laws." Even in this case the court was not "prepared to say that population might not be a legitimate basis upon which to divide counties into two classes—one in which there should be but one assessor for the entire county, and the

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other in which there should be an assessor for each municipal division of the county." The attempted classification was held "arbitrary and incomplete, for the reason that it does not include all the members of the same class, but excludes some whose conditions and wants render such legislation equally necessary and appropriate to them as a part of the same class." 76 Minn. 535, 536, 79 N. W. 536.

On the contrary, it has been repeatedly held that a law applying to cities of a class designated by population and determining the legal status of certain financial controversies is not unconstitutional because of the inhibition of special legislation. Thus, in Alexander v. City of Duluth, 77 Minn. 445, 80 N. W. 623, an act legalizing bonds to take up general indebtedness of cities of a certain class, in State v. Gunn, 92 Minn. 436, 100 N. W. 97, an act legalizing county orders and authorizing the issuance of certificates of indebtedness, and in State v. Brown, 97 Minn. 402, 106 N. W. 477, an act legalizing school bonds, were upheld. In the case last cited the entire subject of the validity of curative acts, as distinguished from special laws, was elaborately considered by Mr. Justice Elliott. All relevant cases, including those to which plaintiff refers us, and the leading opinions in other jurisdictions, were there examined and considered. It would be a work of supererogation to here further review or distinguish those authorities. Within the rules there laid down, the act here in question was valid as a curative act. No case decided since tends in any wise to alter this conclusion. The object of this statute was to remedy a present condition. It was a valid exercise of legislative discretion, was not based upon an arbitrary or illusory distinction, and was not invalid because it constituted special legislation.

Second. The remaining objections to the validity of the law are the familiar ones usually, if not invariably, urged against curative laws which create a right or impose a complete legal obligation upon a state of facts which had given rise to an imperfect right or to an unenforceable obligation only. Their effect is to deny ability of legislation to impair a vested right. The authorities to which defendant has referred us announce elementary and indisputable principles. None of them are specific or inconsistent with the fundamental principles which underlie the power of the legislature to ratify and upon which the decision of the present case depends. That principle is this: Unless

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there be a constitutional inhibition or an interference with a vested right, the legislature has the power to validate invalid contracts or to ratify and confirm any act it might lawfully have authorized in the first place. Anderson v. Santa Anna, 116 U. S. 356, 6 Sup. Ct. 413, 29 L. Ed. 633, in which Harlan, J., examined and stated the authorities on this subject at considerable length. And see Bolles v. Brimfield, 120 U. S. 759, 7 Sup. Ct. 736, 30 L. Ed. 786. For convenience the exceptions will be first considered, and afterwards the rule will be considered.

The instant case is not within the exception of a constitutional inhibition. It is clear that if an invalid contract be executed by a municipality, and a constitutional amendment be adopted subsequently denying to the legislature the power of ratifying, a later curative act is inoperative. Sykes v. Mayor, 55 Miss. 115, 116; Katzenberger v. Aberdeen, 121 U. S. 172, 7 Sup. Ct. 947, 30 L. Ed. 911; Elliott, Mun. Corp., 151, § 160. Here, however, the power of the legislature to legalize was the same as its power to have originally authorized. No constitutional change had diminished or affected that power. The plaintiff does not contend that the legislature could not have originally authorized the ordinance here assumed to be invalid. His argument is that the ordinance was wholly unauthorized by the charter.

The instant law is not within the exception based on the inability of the legislature to interfere with vested rights, within the comprehensive sense here given to that expression. It is familiar that there are many instances and classes of cases in which the legislature may cure irregularities or informalities, but may not be able to validate substantial defects. Thus, while it may cure mere technical error in tax proceedings, it cannot validate defects which go to the jurisdiction of the officers conducting the proceedings. McCord v. Sullivan, 85 Minn. 344, 88 N. W. 989, 89 Am. St. 561, and Olson v. Cash, 98 Minn. 4, 107 N. W. 557, to which plaintiff refers us, are of this character; and see Black, Const. Law, § 288, p. 630. Clearly a legislature cannot diminish the vested right of either the landowner or tax certificate purchaser by retrospective laws. Generally any right vested in a private person to a thing, to a cause of action, or to a defense to an action is beyond the power of the legislature to destroy or diminish. The case at bar, however, is not of this class. Here no private right of

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any kind had vested. By way of contrast, see authorities collected in note to 22 L. R. A. 379.

The instant case is within the general principle that the legislature may confirm whatever municipal obligation it could have authorized at the time of the attempted ratification. The legislative power was not, under the constitution, restricted to cure mere informalities or irregularities. The terms of the law purported to legalize the transaction. There was nothing which would have prevented the legislature from originally authorizing such transactions by the municipality. What it could have done it may confirm. In Utter v. Franklin, 172 U. S. 416, 19 Sup. Ct. 189, 43 L. Ed. 498, certain void territorial bonds were attempted to be validated by the act of congress by providing for their funding. Brown, J., said: "The fact that this court had held the original * * * bonds invalid does not affect the question. They were invalid because there was no power to issue them. They were made valid by such power being subsequently given, and it makes no possible difference that they had been declared to be void under the power originally given." And see Bolles v. Brimfield and Anderson v. Santa Anna, supra. This rule, enforced by many other federal decisions, is the settled law of this state. Thus it was held that bonds, irregularly issued by a municipal corporation may be legalized. Kunkle v. Town of Franklin, 13 Minn. 119 (127) 97 Am. Dec. 226; Comer v. Folsom, 13 Minn. 205 (219). In Nash v. Lowry, 37 Minn. 261, 33 N. W. 787, it was held that an invalid ordinance might be converted by a curative act into an irrevocable contract. And see Coles v. County of Washington, 35 Minn. 124–127, 27 N. W. 497. In State v. Bruce, 50 Minn. 491–495, 52 N. W. 970, Collins, J., said: "But the distinction between valid and invalid legislation on this subject has been pointed out many times, and it is well settled that, if there rests upon the designated municipality any obligation or duty, moral or equitable (using these words in a large and popular sense), to pay the claim, then a legislative act requiring its payment is supported as valid by the great weight of authority." There is much more authority to the same effect, reference to which would merely encumber the record.

We are of opinion that the facts bring this case within this rule. The city had received an equivalent for the transactions legalized. See Mr. Justice Field in New Orleans v. Clark, 95 U. S. 644, 654, 24 L. Ed.

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521. It had been paid and had received the actual amount of money involved in the curative law. To make definite the exact facts, we quote from the well-considered memorandum of the learned trial court: "The licensees, the city, and the taxpayers have assumed the ordinance to be valid, acted on it, incorporated its provisions in the very license purchased, and, what is more, in each case referred to in the complaint when a refund of a portion of the $1,000 fee was made at once another $1,000 was received by the city from another licensee for the same place, or for another place if the holder of the surrendered license moved to it. The last $1,000 was undoubtedly paid out and accepted on the understanding that the pro rata part of the unexpired time of the license for which the first $1,000 was paid was to be refunded. For the place licensed the city has had the full $1,000 per year. From the licensee who has run one saloon only the city has had the full $1,000 per year. If the licensee had not been permitted to surrender his license and have it revoked, no new license would or could have been issued to his successor, nor would he have applied for a license to do business at any other place. The city could not issue a new license and obtain another $1,000, unless the existing license for the same place was surrendered." We therefore conclude that the curative law was valid.

The questions presented to this court are purely legal, and not moral, in character. They should be, and have been, determined by the application of principles of law only, and not of private views of public policy. Plaintiff has eloquently urged that: "It is the curse of the liquor traffic that, while the most apparent physical effects are observable in the unfortunates to whose weakness and passions it directly ministers, yet the blight of it, through the damnable social and political alliance it has contracted with the state, permeates the entire community, not sparing the wisest, the bravest, the best. We are so accustomed to seeing this mighty power set at naught every restraint which the law has sought to put upon it—defiantly where it dares; insidiously where it must—that the effort in the utmost honesty to apply the ordinary rules to matters where it is involved seems almost as difficult as imagining the fourth dimension." It is our manifest duty to hold that legislation valid under the constitution is effectual. The expediency of the

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law immediately under consideration was a matter exclusively for the legislature to determine.

In this view of the case it is unnecessary to question defendant's further contention, supported as it is by apt authorities, that the right to regulate traffic in intoxicating liquors rests wholly in the police power of the state, has no connection with and is in no sense founded on the power of taxation, that the passage of the act was an exercise of the police power of the state, and that the act was valid for that reason.

4. There is no merit to the contention that the findings fail to bring the case within the scope of the act, because good faith is shown as to the part of the officials only, and that the findings do not show good faith as to any officials. The limited record presented to us, involving the absence of testimony and of motions concerning the findings, if any were made, renders it difficult, if not impossible, to disturb the findings of fact, and hence the conclusions of law. It is elementary that such findings must be construed in the light of the whole proceedings and testimony. That light is wholly absent here. On a number of hypotheses, consistent with the record and perhaps compelled by the necessary presumptions in favor of the propriety of judicial conduct, affirmance would necessarily follow. It is unnecessary, however, to so decide here; for the same conclusions must be drawn from other considerations.

The statute required affirmative proof of the good faith of the officers who had "paid out public moneys." It did not require proof of good faith on the part of the council which had appropriated public moneys or ordered public moneys to be paid out. Defendant urges that a curative act should receive a liberal construction, and cites State v. Spaude, 37 Minn. 322, 324, 34 N. W. 164, Farnsworth L. & R. Co. v. Commonwealth Title Ins. & T. Co., 84 Minn. 62, 86 N. W. 877, and State v. Brown, 97 Minn. 402, 106 N. W. 477. The correctness of that proposition is not here involved. The natural and proper interpretation is that good faith of the officers who "paid out public money" must be shown. It would be a strained and unnatural construction to require that good faith on the part of the council should also be shown. If the legislature had so intended it, it should have so provided. In other words, a law which validates certain transactions on proof of good faith

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of both legislative and administrative officers of the city is not the same as a law which validates such transactions on proof of good faith of administrative officers of the city only. This law did not in terms, or by reasonable inference, require proof of good faith on the part of the legislative body of the municipal corporation.

The trial court found "that in making such refund of unexpired license fees in each of the instances mentioned in the complaint the officers of said city, to wit, the mayor, comptroller, and treasurer, made the same in good faith, believing such refunds to be in accordance with law. It, however, appears that some of the city officials named knew that the defendant brewing company had advanced or loaned the applicant for license money to pay for the license fee, and knew that the company held the power of attorney above referred to and the license as security for such loan." It clearly and affirmatively found that the mayor, comptroller, and treasurer made the payments in good faith. The subsequent findings as to their knowledge did not have the effect of negativing the specific finding. The error in the legal conception of these officers was not inconsistent with the bona fides of their conduct. The additional finding was unnecessary and immaterial.

Affirmed.

A. H. POWERS v. EMMA A. JOHNSON and Another.[1]

April 30, 1909.

Nos. 16,016—(15).

Admissions by Deceased Person.

Admissions of a person, since deceased, tending to establish a controverted fact in litigation, are scrutinized closely, and their weight and effect as substantive evidence are for the trial court.

Same.

Though uncontradicted, they are not necessarily conclusive.

Findings of Court.

Findings of the trial court *held* not clearly or palpably against the evidence.

[1] Reported in 120 N. W. 1021.

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Action in the district court for Itasca county. The facts are stated in the opinion. The case was tried before McClenahan, J., who made findings and as conclusions of law found that plaintiff had no right or title to the lands in controversy; that defendant Kenneth Clark for himself and others was the owner in fee simple of an undivided three-tenths interest in the lands; that the intervener, Charles W. Murphy, was the owner in fee simple of an undivided seven-tenths interest in the lands. From an order denying plaintiff's motion to set aside the findings and for a new trial, he appealed. Affirmed.

George C. Ripley and *H. B. Fryberger,* for appellant.

John F. Fitzpatrick and *Davis, Kellogg & Severance,* for respondents.

BROWN, J.

The A. J. Dwyer Pine Land Company was a corporation duly organized under the laws of this state, and as such owned certain tracts of land situated in this state and also in the state of Oregon. Plaintiff, A. H. Powers, and A. J. and W. J. Dwyer, were separately the owners of all the capital stock of the corporation, and had pledged the same to the Flour City National Bank of Minneapolis as security for an indebtedness due from each. The indebtedness was not paid, and some time in the year 1901 the bank duly foreclosed its lien upon the stock, purchased the same at the sale, and, no redemption being made, thereby became the sole owner thereof. In November, 1903, the bank sold and transferred the stock to one S. S. Johnson, of California, for the consideration of $150,000, less deductions made on account of the failure of title to certain of the land owned by the land company in the state of Oregon. This sale was effected through the efforts of plaintiff and A. J. Dwyer, and under an agreement with the bank that they should retain all they could obtain for the stock over and above the amount then due the bank.

Johnson subsequently died, and thereafter plaintiff brought this action against his executors and Kenneth Clark, who had succeeded to a part of the rights of Johnson, for a settlement and adjudication of rights and equities arising, as plaintiff claims, under a contract with Johnson entered into at the time of the sale of the stock to him by the bank. Plaintiff alleges that he and Johnson, as a part of that trans-

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action, entered into a contract or agreement by which Johnson agreed to convey to plaintiff, after perfecting the purchase from the bank, a certain interest in the corporation and the stock, namely forty per cent. thereof, and that Johnson further agreed "to carry for this plaintiff said forty per cent." at five per cent. interest. The complaint alleges a violation of this agreement and demands appropriate relief. The trial court found that no "contract, agreement, or understanding [was] made or entered into between the plaintiff A. H. Powers and said S. S. Johnson, whereby [plaintiff] was to have any interest in the said capital stock" so purchased by Johnson from the bank, or in any property owned by the Pine Land Company, and judgment was ordered against plaintiff. Plaintiff thereafter moved for a new trial, assigning this and other findings as error, and appealed from an order denying it.

A careful examination of the record leads to an affirmance. Plaintiff's right to recover depends wholly upon the existence of the contract alleged by him to have been entered into with Johnson at the time the latter became the owner of the land company stock. That no such contract was entered into the court expressly found, and our examination of the evidence discloses no sufficient reason, within the rule guiding this court, for disturbing its findings. They are not clearly or palpably against the evidence. It is true there are items of evidence tending to show admissions by Johnson that some sort of a contract was made with plaintiff; but no competent evidence of the contract itself was produced, and the court was not required, since Johnson is dead and unable either to admit or deny the alleged admissions, to find its existence therefrom. 17 Cyc. 808; Lowe v. Lowe, 83 Minn. 206, 86 N. W. 11; Binewicz v. Haglin, 103 Minn. 297, 115 N. W. 271, 15 L. R. A. (N. S.) 1096. The admissions, though admissible in evidence, were not conclusive, and served only to present, in connection with the other evidence, a question of fact. They were subject to the closest scrutiny, and it was for the trial court to determine their weight and effect. 17 Cyc. 808; Lea v. Polk County Copper Co., 21 How. 493, 16 L. Ed. 203; Alexander v. Hooks, 84 Ala. 605, 4 South. 417; Woolsey v. Williams, 128 Cal. 552, 61 Pac. 670; Holmes v. Conrable, 111 Iowa, 298, 82 N. W. 780.

Since, therefore, plaintiff's alleged contract does not appear, his case fails. It would serve no useful purpose to extend the opinion by dis-

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cussing the evidence. This we are not required to do. It is sufficient that we have carefully read it, with the result stated. Carver v. Bagley, 79 Minn. 114, 81 N. W. 757.

Order affirmed.

HORACE L. HARMON v. CHICAGO & NORTHWESTERN RAILWAY COMPANY.

JOSEPHINE HARMON v. CHICAGO & NORTHWESTERN RAILWAY COMPANY.[1]

April 30, 1909.

Nos. 16,050, 16,051—(56, 57).

Charge to Jury—Correct in Part, Erroneous in Part.

In actions brought by a husband and by his wife, respectively, but tried together, both plaintiffs were injured, as the jury found, by defendant's negligence while they were driving across its tracks. The issues of negligence and contributory negligence were submitted to the jury. The trial court charged: "The verdicts found by you will necessarily be both of them either for the plaintiff or the defendant. The evidence would not justify a verdict in one case for the plaintiff and for the defendant in the other." In so far as this instruction concerned the negligence of defendant it was correct; for the same misconduct of defendant was relied upon by both plaintiffs. In so far as this instruction concerned contributory negligence it was erroneous; for the jury might properly have returned a verdict for one plaintiff and not for the other.

Two actions in the district court for Redwood county to recover $1,995 and $1,950 damages respectively for personal injuries sustained while attempting to cross a railroad track. Husband and wife brought separate actions which by consent were tried together before Olsen, J., and a jury which returned a verdict in favor of Horace L. Harmon for $750 and a verdict in favor of Josephine Harmon for $250. From

[1] Reported in 120 N. W. 1022.

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an order denying defendant's motion for a new trial, it appealed. Reversed and new trial granted.

Brown, Abbott & Somsen, for appellant.

C. T. Howard and *T. M. Quarton,* for respondents.

JAGGARD, J.

The appeal in this case was taken from the order of the trial court denying defendant's motion for a new trial in two actions tried together. The one was brought by the husband and the other by the wife. They received damages for injuries caused by the negligence of the defendant, as the jury found, while they were undertaking to cross defendant's tracks. The husband was driving a gentle farm team hitched to an ordinary top buggy. The wife sat beside him. In entering the city the public road which they were using crossed the east end of defendant's switchyard and involved passing two switch-tracks before the main track was reached. These two tracks were, respectively, thirty and fourteen feet distant from the main track. At the time of the accident cars were standing thereon. Plaintiffs were obliged to go by the ends of these cars in approaching the main track. The husband, whose vision and hearing were somewhat impaired drove to a place about eight rods distant from the crossing, stopped, looked, and listened. Discovering no evidence of danger, he proceeded. When the horses' heads were on the second track, about fourteen feet from the main track and at the east end of the cars on the side track, an engine passed on the main track, immediately in front of them. The horses started, backed, and broke the buggy pole. Plaintiffs were injured; the husband more seriously than the wife.

1. One assignment of error is addressed to the refusal of the court to charge the jury in accordance with defendant's request, so as to define the exact negligence on which only plaintiffs might prevail. The propriety of the court's action is to be determined by consideration, not only of the pleadings themselves, but also of the course of the trial. An examination of the record in these respects has satisfied us that the case was fully and fairly litigated, and that although the pleadings, after somewhat general statement of negligence, tended to limit defendant's wrong by a more specific allegation, defendant was in no wise prejudiced by the excess of particularity. In brief, while we are

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not prepared to say that there may not have been technical or formal error, we are clear that it did not constitute sufficient basis for granting a new trial.

2. The gist of the controversy is this: After the court had charged fully, and, we think, correctly, upon the questions of negligence of the defendant and of the contributory negligence of plaintiffs, and had refused, modified or given requests to charge, it read forms of verdicts to the jury, and then added this instruction, the giving of which is duly assigned as error: "The verdicts found by you will necessarily be, both of them, for the plaintiff or the defendant. The evidence would not justify a verdict in one case for the plaintiff and for the defendant in the other." So far as this instruction concerned the negligence of defendant, it was obviously correct. Both plaintiffs complained of the same misconduct on the part of defendant.

The question arises whether this instruction was not erroneous in assuming that, so far as contributory negligence of the husband and wife, the evidence would not justify a verdict for one and not for the other. The defendant insists that this was substantially prejudicial to it; the plaintiffs' counsel that "it was highly favorable to defendant, and [the wife] might have complained of it, as it imputed to her any possible negligence of her husband."

It is clear that the requirement of care on the part of the wife, who was a passenger, was not the same as the requirement that the husband, who was the driver, should take care. What might have been contributory negligence on the part of the husband would not necessarily have been contributory negligence on the part of the wife. On general principles, the husband might have been precluded from recovery and the wife have been awarded damages. If, as a matter of law, neither party was guilty of contributory negligence, there would have been no error. The record, however, would not justify such a holding; and the trial court expressly submitted to the jury the issue of contributory negligence. The strongest point in plaintiffs' answer to this is: According to the record the defense was that the tugs came unhooked and that the plaintiffs' conduct had no connection with the accident. Further, it is insisted that the wife's participation in the exercise of care by her husband would not leave her in the position of a passenger pure

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and simple. These considerations were, we think, clearly for the jury. It follows that a new trial must be granted.

Other assignments of error have been examined, and, under the circumstances presented by this record have been found not to be meritorious.

Reversed and a new trial granted.

NILS WICKSTROM v. SWAN P. SWANSON and Another.[1]

April 30, 1909.

Nos. 16,060—(62).

Action for Money Deposited.

Action to recover money delivered to the defendants by the plaintiff safely to be kept and returned on demand. Verdict for the plaintiff. *Held*, the evidence is sufficient to sustain the verdict against both defendants.

Charge to Jury.

The trial court did not err in its charge to the jury, nor in refusing to give requested instructions.

Assignments of Error not Argued.

Certain assignments of error as to rulings on the admission of evidence waived, because not urged in the brief.

Malicious Prosecution.

Where the termination of a prosecution has been brought about by the procurement of the defendant, or by compromise or agreement of the parties, an action for malicious prosecution cannot be maintained.

Same—Counterclaim.

The court did not err in refusing to submit the defendant's counterclaim for damages, based on his alleged malicious prosecution by the plaintiff, for the reason that the evidence did not show want of probable cause therefor.

Action in the district court for Hennepin county to recover $1,300 which plaintiff alleged that he intrusted to the defendants on January

[1] Reported in 120 N. W. 1090.

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7, 1908, and which he alleged the defendants converted and disposed of to their own use. The case was tried before John Day Smith, J., and a jury which returned a verdict in favor of plaintiff for the sum demanded. From an order denying defendants' motion for judgment notwithstanding the verdict or for a new trial, they appealed. Affirmed.

Gjertsen & Lund, for appellants.

Mead & Robertson, for respondent.

START, C. J.

This action was brought in the district court of the county of Hennepin to recover from the defendants $1,300 for money received by them from the plaintiff, to be returned to him on demand. Verdict for the plaintiff for the amount claimed, and the defendants appealed from an order denying their joint and several motion for judgment notwithstanding the verdict or for a new trial. A brief statement of the allegations of the pleadings is essential to a consideration of the defendants' assignments of error.

The complaint alleged that the defendants were and are copartners under the name of Swanson Bros.; that at Minneapolis, on January 7, 1908, the plaintiff intrusted to the defendants $1,300 belonging to him, upon their promise to safely keep and return to him on demand; that they converted the money to their own use and refused to repay the same to him; and, further, that on January 11, 1908, he demanded from the defendants the money, but they refused to repay to him any part thereof. The defendants answered separately, both of them admitting the alleged partnership.

The answer of the defendant Swan P. Swanson admitted and alleged that the plaintiff delivered to him personally the $1,300, to be kept for the plaintiff; that a demand was made for its return; but denied that the money was delivered to the firm, and also denied that he converted any part of the money. As a defense the answer alleged that the defendant carried the money upon his person to the knowledge of the plaintiff, who, with his friends, kept him drunk for two days, and while he was in a helpless condition they took the money from him, and the plaintiff repossessed himself of the money. As a counterclaim the answer alleged that the defendant had sustained damages in the sum

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of $3,000 by reason of his malicious prosecution in the municipal court of the city of Minneapolis on a charge of embezzling the money intrusted to him by the plaintiff. The alleged defense and counterclaim were put in issue by the reply.

The answer of Theodore Swanson denied that the money was ever delivered to the copartnership, or received by it, or by himself, and alleged that the plaintiff had repossessed himself of the money, substantially as alleged in his codefendant's answer.

The defendants did not, by demurrer or otherwise, raise any question as to the form or substance of the complaint.

1. The first contention of the defendants to be considered is to the effect that the action is solely one of conversion of the money; that the money came lawfully to the possession of the defendant Swan P. Swanson; that it is undisputed that at the time the demand was made for its return the money had been lost; and therefore there was no conversion, and the trial court erred in denying the defendants' motion for a directed verdict.

Where a party is in the lawful possession of goods as bailee, and he loses them by neglect, the remedy in general must be assumpsit for a breach of the contract of bailment or an action on the case for a neglect of duty whereby the subject of the bailment was lost. 1 Chitty, Pl. 134, 155. If, therefore, this action is solely one for conversion, and the evidence is conclusive that the defendants lost the money, and did not actually convert it to their own use, the action cannot be maintained; for it is conceded that the original possession of the money by the defendants was lawful, it having been delivered to the defendant Swan P. Swanson, who gave his receipt therefor to the plaintiff. We are, however, of the opinion that the question whether the defendants, or either of them, lost the money, was one of fact for the jury. Again, this action is not solely one for conversion; for, if it be conceded that the complaint states a cause of action in conversion, it also states a cause of action ex contractu for a breach of the contract of bailment, by alleging, as it does, the intrusting of the money to the defendants upon their promise to safely keep and return it to plaintiff on demand, which was made and refused. No question was made that several causes of action were improperly joined, and the plaintiff was entitled to a verdict if he established either one of them. When it was either

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proven or admitted by the pleadings that the defendants received the money from the plaintiff upon the promise safely to keep and return it on demand, that such demand was made and refused, the contract of bailment and its breach were prima facie established, and the burden was then on the defendants to excuse the breach.

It is also urged that the bailment was not a partnership transaction, but was the individual contract of the defendant Swan P. Swanson; hence the trial court erred in denying the motion of the defendant Theodore Swanson for a directed verdict in his favor. There was evidence tending to show that it was a partnership transaction. It follows that the trial court did not err in denying the defendants' motion for a directed verdict in favor of the defendants, or for either of them, and that the verdict is sustained by the evidence.

2. The defendants further claim that the court erred in submitting the question of the defendants' liability as an innkeeper, for the reason that the evidence fails to allege facts which would constitute an innkeeper's liability. The short answer to this claim is that the court did not submit the question of the defendants' liability as innkeepers; but, on the contrary, the jury were expressly instructed that the defendants' place of business, which consisted of a saloon and lodging house, and was conducted by them, was not an inn within the meaning of the law. The court, however, did instruct the jury as follows: "If, without compensation of any kind, a person keeping a saloon and lodging house like this receives money on deposit, without compensation, and wholly for the bailee's [bailor's] benefit, then he is responsible for only gross negligence; but if, however, the person who deposits the money is a guest of the saloon and lodging house, perhaps compensation may be implied from the law, and he is held to the exercise of ordinary care in keeping and returning the money that is committed to his charge."

The giving of this instruction is assigned as error; but it is only incidentally urged in the brief, if at all. Waiving this, we are of the opinion that the giving of the instruction was not error, for there was evidence tending to show that the plaintiff, while he did not stay at the defendants' place of business the first night after the money was deposited, yet he did so lodge at their place the following two nights; that he was a patron of their bar; that the patrons of the defendants were laborers, including the plaintiff, many of whom were accustomed

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to leave their money with the defendants, while at their place of business, who had a safe in which money so deposited with them was kept; and, further, that the plaintiff had stopped at their place some eight years prior to the time in question. Upon this evidence the jury might well infer that some pecuniary benefit would accrue to the defendants by their receiving and keeping the plaintiff's money for him.

3. Many alleged errors are assigned by the defendants as to the rulings of the court in receiving certain evidence over their objections. The alleged errors are not urged in the brief of counsel, other than as follows: "The court should have sustained our objection to the evidence which plaintiff offered tending to show the character of the business conducted by the defendants as to renting out rooms, etc. We therefore submit that assignments of error numbers 1, 2, 4, 11, 12, 13, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, and 32 ought to be sustained." This points out no reason why the court erred in overruling the defendants' objections, but simply invites this court to grope through the record to find error in the rulings, if any there be, and they clearly fall within the rule that assignments of error not urged in the printed brief are waived. Peterson v. City of Red Wing, 101 Minn. 62, 64, 111 N. W. 840.

4. The last contention of the defendants to be considered is that the court erred in withdrawing the counterclaim of Swan P. Swanson from the consideration of the jury. At the close of the evidence the plaintiff's attorney made a motion to strike out all of the evidence given with reference to the alleged counterclaim, for the reasons that neither malice nor want of probable cause had been proved, and, further, that the dismissal of the prosecution against defendant in the municipal court was not such a termination of the cause as would lay the foundation for an action of malicious prosecution. The court granted the motion, and the counterclaim was not submitted to the jury.

The record justifies the conclusion that the defendant was not guilty of the offense of embezzling the money, as charged by the plaintiff in his complaint against him in the municipal court; but this is not the test of probable cause. Genevey v. Edwards, 55 Minn. 88, 56 N. W. 578. The evidence shows that the plaintiff was a railroad laborer from Spokane, who was quite ignorant, having little, if any, knowledge of legal matters; that he demanded his money from the defendant, and was

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told by him that he could not pay him, because he had lost it—did not know what had become of it; that they were looking for it, and asked him to wait a few days, as the police were investigating the loss of the money; that the plaintiff made a second demand for the money, and the defendant told him to go to Spokane, and he would send the money to him; that the plaintiff had known the defendant for some years, and left with him some money eight years before, which was paid on demand; and, further, that the plaintiff, failing to get his money, or any explanation why it was not paid which was satisfactory to him, consulted a competent and reputable attorney, who called upon the defendant and asked him why he did not return the money, and was informed that the matter was being investigated, but to his question, "What are you investigating?" no answer was made; that the attorney then left, and two days thereafter he advised the plaintiff to swear out a warrant against the defendant for embezzlement, and the plaintiff acted upon the advice, and the defendant was arrested upon his complaint; that upon a hearing before the municipal court three witnesses were sworn for the state, and thereupon the defendant's attorney moved to dismiss the case, which the court denied; that the defendant swore at least two witnesses, and then renewed his motion to dismiss; that the court stated that it had some doubt upon the question of intent; that the question of intent would be plainer if the defendant would return the money he had received from the plaintiff; that defendant's counsel then stated that he would not return the money but that he would agree to put $1,300 in the bank, or would leave it with the court, to abide the event of a civil action which had then been commenced; and, further, that plaintiff's counsel, in response to a question by the court, stated that such an arrangement would be satisfactory, and he would take the word of defendant's counsel that the money would be so deposited, and upon such word being given the court dismissed the case.

The evidence as to the manner of the termination of the criminal case is undisputed. Where the termination of the prosecution has been brought about by the procurement of the defendant, or by compromise and agreement of the parties, an action for malicious prosecution cannot be maintained. 19 Am. & Eng. Enc. (2d Ed.) 684; 26 Cyc. 59; Craig v. Ginn, 3 Penniwell (Del.) 117, 48 Atl. 192, 94 Am.

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St. 77, 53 L. R. A. 715. Upon the whole evidence we are of the opinion that want of probable cause for the prosecution was not shown, and that the trial court did not err in refusing to submit the alleged counterclaim to the jury.

Order affirmed.

JOHN PEEK v. ADOLPH B. OSTROM and Another.[1]

April 30, 1909.

Nos. 16,154—(122).

Judgment Non Obstante Erroneous.

The evidence was not conclusive that appellant assumed the risk or was guilty of contributory negligence in attempting to clear away the sawdust and spalts which accumulated under the saw he was operating, and it was error to order judgment for the defendant notwithstanding the verdict.

Action in the district court for Hubbard county to recover $10,000 for personal injuries received by plaintiff while employed by defendants in their shingle mill. The case was tried before Stanton, J., and a jury which returned a verdict in favor of plaintiff for $2,000. From an order granting defendants' motion for judgment notwithstanding the verdict, plaintiff appealed. Reversed and verdict reinstated.

Charles Loring, for appellant.

Gjertsen & Lund, for respondents.

LEWIS, J.

Appellant had his hand cut on what is known as a splitting saw, in the shingle department of respondents' mill, while cleaning out a chute which conveyed the sawdust and edgings from the saw, and recovered a verdict in the court below for the sum of $2,000. The trial court granted respondents' motion for judgment notwithstanding the verdict, and this appeal brings before us the question whether there is any evidence reasonably tending to support the verdict.

[1] Reported in 120 N. W. 1084.

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Appellant was twenty years old, and had worked one month in a sawmill at logging, a month and a half in another sawmill at Grace Lake Spur, and about twenty three days in another mill tying edgings and driving a team. According to appellant's testimony, he applied for work at respondents' mill, and was directed to work on the splitting saw mentioned; that the foreman took him upstairs, and pointed out the saw at which he was to work, but gave him no instructions; that his work required him to place shingle bolts upon the carrier and push them into the circular saw, thus sawing them into shape for the shingle saw; that the pieces falling from the saw dropped from the carrier into a hole in the floor immediately below, through which they were supposed to be conveyed to a carrier, which carried them to the boiler for fuel; that, after he had operated the saw for a few hours, the foreman appeared and told him to pick up as many of the pieces (called spalts) as he conveniently could and throw them out of the window, and to shove the rest, with the sawdust, down the hole; that the sawdust and spalts falling into the hole choked up the chute below, and permitted the refuse to accumulate under the saw, which made it necessary for him to go around to the side of the machine and poke it down out of the way. The circumference of the saw reached within about fourteen inches of the floor, and a plank ran parallel with the saw, covering all of the blade with the exception of about four or five inches. He testified that the hole was about sixteen or seventeen inches in length and about eight inches wide; that, while he was engaged in pushing the sawdust and spalts down the hole with a stick, the stick caught, and caused his hand to be thrown against the saw and injured.

The evidence clearly shows that the saw was in an exposed position, and any one working around it might easily come in contact with it, and it was fairly established that it was practicable to more completely guard the saw by extending the covering in front of it from four to six inches further toward the floor, still leaving an exposed space of eight or ten inches for the purpose of cleaning out under the saw. The evidence is sufficient to sustain the allegation that respondents did not take adequate measures to keep the chute free, and to prevent the sawdust and edgings from piling up under the saw. At least two others, who had operated the saw, testified that they had found it

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necessary to remove the material in the same manner. Although the foreman and other witnesses testified that appellant had not been instructed and was not required to clean out the material, and that other employees were engaged for that specific purpose, yet the evidence is conclusive that those employed for that purpose did not keep the chute free and clear, and it does not appear that appellant was instructed not to clean it out.

The only serious question in the case is whether appellant assumed the risk in attempting to clean out the chute, or was guilty of contributory negligence in attempting to do it in that manner. On the question of assumption of risk, if it be true that appellant was put to work upon the machine without any instructions, then it was an open question whether he did not have a right to assume that it was a part of his duty to remove the material when it clogged up to such an extent as to prevent the operation of the saw. Appellant claims to have acted upon that theory, and assumed that it was a part of his work to remove the accumulated material when it became necessary. If it be true that, after he had been working for some time, the foreman appeared and told him to remove such of the spalts as he conveniently could, and to shove the rest, with the sawdust, down through the hole, then that work was specifically made a part of his duty in operating the machine. He was not a meddler, and he only assumed the risk in so far as he appreciated the danger. Appellant was a young man of very limited experience in and about sawmills, and with less than a day's experience upon this particular saw. While any reasonable person might know that his hand might be cut if it came in contact with a revolving saw, yet an experienced person might not appreciate the danger of getting his hand in contact with the saw while engaged in doing the work in that manner. An older and more experienced person might exercise the judgment to select a long stick and keep his hands at a proper distance; whereas, an inexperienced person of immature judgment might consider it safe to attempt to do it with a short stick, and so inadvertently permit his hand to come in contact with the saw.

On the question of contributory negligence the same reasoning applies. It is not to be presumed that he voluntarily put his hand in a dangerous position, and whether or not he exercised due care depended upon his experience, the instructions he received, and the natural desire

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on his part to perform the duties assigned him. Upon all of these questions the evidence was somewhat conflicting; but the credibility of the witnesses and the weight of the evidence were for the jury. The case was submitted to the jury by the court with proper instructions. The jury found for appellant, and the verdict cannot be set aside, unless it conclusively appears from the evidence that under no circumstances was he entitled to a verdict. We are of opinion that the views of the learned trial court in submitting the case to the jury were correct, and that he was not justified in setting aside the verdict upon the grounds stated.

The appeal being from an order granting a motion for judgment notwithstanding the verdict, it is ordered that the order be reversed, and the verdict be reinstated.

ELLIOTT, J. (dissenting).

I think the plaintiff was guilty of contributory negligence, and that the trial court properly ordered judgment for the defendant. I therefore dissent.

JOHN A. LAGERMAN v. LAWRENCE I. CASSERLY.[1]

April 30, 1909.

Nos. 16,167—(151).

Statute of Limitations—Action Restrained by Injunction.

The rule that, whenever a person is prevented from exercising his legal remedy by some paramount authority, the time for which he is thus prevented must not be counted against him in determining whether the statute of limitations has barred his right, applies only when such paramount authority is invoked and the restraint induced by the debtor.

Same.

The statutory provisions suspending the running of the period of limitation during the time the beginning of an action is stayed by an injunction or other statutory prohibition apply only between parties to the suit, and not where the injunction is granted in a suit to which the debtor is not a party.

[1] Reported in 120 N. W. 1086.

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Action in the district court for Ramsey county by the receiver of the insolvent Germania Bank to enforce the collection of an assessment levied upon five shares of the capital stock of the Germania Bank, belonging to defendant. The case was tried before Olin B. Lewis, J., who made findings of fact and as conclusion of law found that plaintiff was entitled to $500. From an order denying defendant's motion for a new trial, he appealed. Reversed.

O. E. Holman, for appellant.

James E. Trask, for respondent.

ELLIOTT, J.

This was an action to enforce the collection of an assessment levied upon the stock of the Germania Bank. The defendant, Casserly, was a stockholder, and the sole question is whether the statute of limitations had run against the cause of action. The trial court found in favor of the plaintiff, and the defendant appealed from this judgment.

The facts with reference to the failure of this bank have been fully stated in previous decisions and need not be repeated. Willius v. Mann, 91 Minn. 494, 98 N. W. 341, 867; Willius v. Albrecht, 100 Minn. 436, 111 N. W. 387, 112 N. W. 862; State v. Germania Bank of St. Paul, 103 Minn. 446, 119 N. W. 61.

For present purposes it is sufficient to say that the Germania Bank became insolvent on January 4, 1897, and the appellant was then the owner of five shares of its capital stock. The bank was subsequently reorganized, but the appellant did not become a stockholder in the new bank. The reorganized bank also became insolvent in July, 1899, and Gustav Willius was appointed receiver, with power to enforce the constitutional liability of the debts of the stockholders. The appellant was not liable for any of the debts of the new bank, but was liable secondarily for the debts of the old bank, although this secondary liability could not be enforced until the liability of the stockholders of the new bank had been exhausted. Willius v. Mann, supra. The cause of action against all the stockholders of the Germania Bank accrued on July 26, 1899, when the receiver was appointed, and a proceeding to enforce the same could have been commenced at any time within six years thereafter. For this purpose two remedies were available—that provided by chapter 76, G. S. 1878, and that provided by chapter 272,

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Laws 1899. The receiver proceeded under chapter 272, but through a misunderstanding of the law neglected to commence proceedings to enforce stockholder's liability within six years after the cause of action arose; and it was held in Willius v. Albrecht, 100 Minn. 436, 111 N. W. 387, 112 N. W. 862, that the statute of limitations had run against the cause of action.

The appellant in this action was liable only secondarily for the debts of the old bank, and after the decision in Willius v. Albrecht an action was commenced against him on the theory that the statute had not run, because the receiver was during a portion of the time restrained by the decision in Willius v. Mann and an order supplementary thereto made by the district court. If the time during which the order of the district court was in force is to be deducted, the trial court properly held that the statute had not run against the cause of action against this appellant. The entire proceedings were under chapter 272, Laws 1899.

In an action against certain stockholders, it was held in Willius v. Mann, on the principle which had been established in Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069, that the stockholders of the reorganized bank were liable primarily for the debts of the old and the new bank, and that the stockholders of the old bank were liable secondarily only for its debts, and that the remedies against the stockholders of the new bank should be exhausted before proceeding against the old stockholders. The lower court was directed to proceed in accordance with that decision rendered February 11, 1904. On May 27, 1904, the district court, on the application of the receiver and without notice to the appellant, made an order restraining the receiver "from collecting from any person secondarily liable for said assessment made on the 17th day of September, 1903, except where such person has become liable by reason of transfer of stock made subsequent to the 4th day of January, 1897, until he shall have exhausted all remedies against the persons primarily liable for or on account of said assessment, and until said court shall make and enter its further order herein to the effect that all remedies against said persons so primarily liable have been exhausted." The order discharging this restraining order was not made until March 30, 1908.

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The decision in Willius v. Mann and the restraining order of the district court were made in proceedings under chapter 272, and were manifestly intended to be confined to the remedies and proceedings provided for by that statute. It was held in Willius v. Albrecht that during all this time the statute of limitations was running against the cause of action against the stockholders, because the right of action to enforce the same accrued on July 26, 1899. That right of action was not affected by the proceedings under the other statute. Willius v. Mann, like Harper v. Carroll, determined the order in which the liability of several classes of stockholders should be enforced, and the order of the district court merely restrained the receiver from collecting from any person secondarily liable for the assessments made on September 17, 1903, in the proceedings under chapter 272. Some proceeding should have been instituted against all the stockholders within six years after the cause of action arose, and thereafter proceedings to enforce the secondary liability should have been stayed until the liability of those primarily liable had been exhausted. But, regardless of all this, the restraining order of the district court did not affect the appellant, because he was not a party to the proceedings in which the order was made. Willius v. Mann was an action against certain stockholders, of which this appellant was not one. It appears that he did contribute $10 toward a fund which was used to pay the expenses of that appeal; but that fact alone is not sufficient to make him a party, and bind him as such by the decision. For certain purposes the stockholders of the corporation were in court through representation by the corporation, and in so far as the interests and affairs of the corporation are concerned they are bound by the judgment. But they are not bound as respects their individual interests, and, when sued as shareholders, they have the right to assert any defenses personal to themselves. Willius v. Mann, 91 Minn. 494, 98 N. W. 341, 867; Straw & Ellsworth Mnfg. Co. v. L. D. Kilbourne Boot & Shoe Co., 80 Minn. 125, 136, 83 N. W. 36.

The rule that, whenever a person is prevented from exercising his legal remedy by some paramount authority, the time for which he is thus prevented must not be counted against him in determining whether the statute of limitations has barred his right, applies only when such paramount authority is invoked and the restraint induced by the

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debtor. A court of equity cannot read an exception into the statute of limitations, although it may under certain circumstances, acting in personam, restrain a debtor from pleading the statute. The statutory provision suspending the running of the period of limitation during the time the beginning of an action is stayed by injunction or other statutory prohibition applies only between parties to the suit, and not where the injunction is granted in a suit to which the debtor is not a party. Sage v. Rudnick, 91 Minn. 325, 98 N. W. 89, 100 N. W. 106; 25 Cyc. 1284; Van Wagonen v. Terpenning, 122 N. Y. 222, 25 N. E. 254; Terrell v. Ingersoll, 78 Tenn. 77. The restraining order issued by the district court was obtained by the receiver upon his own application, without notice to the stockholders who would be affected thereby; that is, the receiver, for his own benefit, had himself restrained from proceeding against persons who were not parties to the action, who had no notice of the application, upon whom the order was never served, and whose interests were to be adversely affected, and he now claims that the period during which he was under this voluntarily imposed restraint should be deducted from the time during which the statute of limitations would otherwise be running against the stockholders. We think the rule thus invoked applies only when the restraint is imposed at the instance of the other party, or by the court in some proceeding to which the debtor is a party.

The order of the trial court is therefore reversed.

OLE MARTINSON v. NORTHERN PACIFIC RAILWAY COMPANY.[1]

April 30, 1909.

Nos. 16,186—(42).

Contributory Negligence.

Appellant was riding on the pilot of the engine of a work train, and when the train came to a stop in the railway yards he jumped off, and was struck by an engine passing upon an adjoining track. *Held*, it conclusively appears from the evidence that he was guilty of contributory negligence.

[1] Reported in 120 N. W. 1086.

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Action in the district court for Clay county to recover $1,050 for personal injuries sustained while in defendant's employ. The case was tried before Taylor, J., and a jury which returned a verdict in favor of plaintiff for $350. From an order granting defendant's motion for judgment notwithstanding the verdict, plaintiff appealed. Affirmed.

F. H. Peterson, for appellant.

Charles W. Bunn and *Emerson Hadley,* for respondent.

LEWIS, J.

Respondent railway company was engaged in operating a steam shovel at a point about three miles west of the village of Audubon. The work train, consisting of an engine, water car, coal car, and a caboose, carried the employees to and from Audubon, and it was their practice to jump on any of the cars, or the engine pilot, and on the occasion in question appellant and his brother got on the pilot of the engine; appellant sitting almost in the center and his brother to his left. Counting from the south, there were four tracks at Audubon; the first one being the elevator spur, the second the east-bound main line, the third the west-bound main line, and the fourth the passing track, which ran north of the depots. At the point of the accident the distance between the main tracks, center to center, was about thirteen feet, leaving a little over eight feet between the rails of the two main tracks. A man could stand between trains passing at moderate speed on the two main lines; but such position would be attended with danger when the trains were going fast. When the work train reached Audubon, on the north main track, on the evening of June 21, 1907, appellant stepped off the engine pilot, turned south, and was immediately struck by some portion of the engine of a wrecking train then passing to the east on the south main track. The company was charged with negligence in running the wrecking train at too rapid a speed and in failing to give the usual signals. Plaintiff recovered a verdict, and the trial court granted a motion for judgment for defendant notwithstanding the verdict, upon the ground that it conclusively appeared from the evidence that plaintiff was guilty of contributory negligence.

For the purposes of this appeal, that view of the evidence most favorable to appellant must be accepted. Appellant was sitting near

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the center of the engine pilot when the train came to a stop in the yard at Audubon. Before stepping off he glanced back over his right shoulder to see if any train was approaching from the west on the adjoining track. He claimed that, after looking east and west he stepped off, and in so doing acquired a momentum which carried him far enough to come in contact with the engine of the wrecking train, which appeared at that moment from the west, and which he did not see in time to avoid. The passing track on the north side was at least twenty feet away, and there was no substantial reason why appellant could not have stepped off on that side. His brother, who was sitting to the left, did so. True, appellant's destination was to the south of the yard, and it might have been a little more inconvenient for him to get off on the north side and pass around the tank car ahead, or to the rear of the train; but this did not justify him in hastily jumping off on the side nearest his home, without examination of the track he was about to cross. While he and the other workmen were expected to ride back and forth on the work train, the company did not assume to place them on any particular part of the train. There was plenty of room on the platforms of the caboose, the coal car, and the flat car which carried the water tank. Appellant voluntarily took a position on the front end of the engine, where his view to the rear was almost wholly cut off by the boiler of the engine, which loomed up behind him. He was not under orders from any one, there was no emergency, and his movements were entirely under his own control. That he looked back and saw the track was clear, in so far as his view was unobstructed by the engine boiler, indicates very clearly that he appreciated the possibility of a train coming from the direction, but took the chance of a hasty jump without proper investigation.

Affirmed.

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STATE v. PATRICK DOYLE.[1]

April 30, 1909.

Nos. 16,194—(25).

Prior Divorce Valid.

The defendant was convicted of nonsupport of his wife. His defense was that she was not his legal wife, because her divorce from her former husband, who is still living, was void for the reason that service of the summons was by publication, and the judgment roll does not show that personal service could not well have been made. *Held*, that the divorce was valid.

Defendant was convicted in the municipal court of Minneapolis of the offense of nonsupport of his wife. From the judgment of conviction, Charles L. Smith, J., he appealed. Affirmed.

M. C. Brady, for appellant.

Frank Healy, City Attorney, and *John A. Dahl,* Assistant City Attorney, for the State.

START, C. J.

The defendant was convicted in the municipal court of the city of Minneapolis of nonsupport of his wife, upon her complaint under R. L. 1905, § 4934, and he appealed from the judgment. His defense was that the complainant was not his legal wife. The record shows that the complainant was married to the defendant in July, 1904; that she was married to William Brannan, who is still living, before she married the defendant; that on April 9, 1903, in an action in the district court of the county of Hennepin, wherein she was plaintiff and her former husband was defendant, she was by the judgment of the court granted an absolute divorce from him on the ground of desertion. Such judgment has never been set aside. The defendant in this case claims that the judgment is void because the court had no jurisdiction to award it, for the reason that there was in the divorce action no legal service of the summons, which was by publication.

The order of the court directing service of the summons by publication was based upon the return of the sheriff, showing that the defendant could not be found within the county, and the affidavit of the plaintiff, which, so far as here material, was in these words: "* * *

[1] Reported in 120 N. W. 902.

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The defendant cannot be found within this state, although diligent effort to find him and serve upon him the summons herein has been made, and which appears more fully from the return of the sheriff of Hennepin county, state of Minnesota, hereto annexed. That the residence of this defendant the deponent verily believes to be in the city of Apizaco, Estado de Flaxcala, commonwealth of Mexico, and that she has deposited within the post-office, city of Minneapolis, Minnesota, a true and correct copy of the summons hereto annexed, postage prepaid, addressed to the defendant at his residence above named."

The order for publication of the summons recited that: "It appearing to the satisfaction of the court by annexed affidavit, copy of the complaint, summons, and sheriff's return therein, that this action is brought for a divorce in one of the cases prescribed by law, and that this defendant cannot be found within the state of Minnesota after due and diligent effort has been made and that the residence of the said defendant is verily believed to be at the city of Apizaco, Estado de Flaxcala, commonwealth of Mexico." The findings of fact and order for judgment of the court recited that the summons was duly served on the defendant by publication, as appeared by affidavit and proof of service on file.

The contention of the defendant is that it appears upon the face of the judgment roll in the divorce action that the order of publication was void. This is the only question in this case. The statute in force when the divorce was granted (G. S. 1894, section 4796), provided that the summons in a divorce action should be served on the defendant personally; but, if personal service could not well be made, the court might order the service of the summons by publication as in other actions. The court, in the divorce action, necessarily found by its order of publication that personal service of the summons could not well be made, and its order and judgment are valid, unless it affirmatively appears upon the face of the judgment roll that personal service of the summons could have well been made. McHenry v. Bracken, 93 Minn. 510, 101 N. W. 960.

While the affidavit for publication did not state the conclusion that personal service could not well be made on the defendant, yet it did state that the defendant could not be found in the state of Minnesota, and that, as the affiant believed, his residence was in a foreign country, Mexico, at a designated city thereof, and that a true copy of the sum-

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mons and complaint had been duly addressed and mailed to him. The court, in granting the order for service of the summons, must have construed this affidavit, and concluded that personal service of the summons could not well be made; that is, it was not practicable to make it. Neither the judgment nor the judgment roll affirmatively shows that personal service of the summons could well have been made. Becklin v. Becklin, 99 Minn. 307, 107 N. W. 243.

We hold that the return of the sheriff and the affidavit of the plaintiff were sufficient to justify the conclusion of the court that personal service of the summons could not well be made, and that its order that it be made by publication was valid.

Judgment affirmed.

STATE v. JOHN COLLINS and Another.[1]

April 30, 1909.

Nos. 16,219—(22).

Sale of Liquor on Sunday.

It is unnecessary, in a criminal complaint charging a sale of intoxicating liquor on Sunday, to allege whether the person accused was or was not a licensed liquor dealer; for a sale by any person is a violation of the law.

Municipal Court of Minneapolis—Power to Jail.

The municipal court of the city of Minneapolis has, under the ordinances of that city regulating the sale of intoxicating liquor, authority to impose imprisonment as a punishment for an unlawful sale of such liquor, without giving defendant an option to discharge his violation of the law by the payment of a fine.

Ordinances Valid.

The ordinances so providing are not void as invading the constitutional rights of the accused.

Same—Case Followed.

State v. Marciniak, 97 Minn. 355, holding that the ordinances in question are not void because in conflict with the general statutes on the same subject-matter, followed and applied.

Constitution—Municipal Charter.

The provisions of section 36, art. 4, of the state constitution, to the effect that no charter thereby authorized to be formed, or ordinances es-

[1]Reported in 120 N. W. 1081.

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acted thereunder, shall supersede any general law defining or punishing crimes or misdemeanors, apply only to cities having home rule charters.

Variance.

Certain variances between the allegations of the complaint and the proof *held* immaterial.

Defendants were convicted in the municipal court of Minneapolis of the offense of selling intoxicating liquor on Sunday. From the judgment of conviction, Waite, J., defendant John Collins appealed. Affirmed.

John H. Steele and *H. S. McGinley,* for appellant.

Frank Healy, City Attorney, and *John A. Dahl,* Assistant City Attorney, for the State.

BROWN, J.

Defendant Collins was convicted in the municipal court of Minneapolis of selling intoxicating liquors on Sunday, in violation of the ordinances of the city, was sentenced to confinement in the city workhouse for forty days, and appealed from the judgment rendered against him. Several questions are raised and discussed by counsel for appellant, nearly all of which are controlled by previous decisions of the court, and therefore require no extended mention.

1. The complaint filed in the municipal court charged defendant and one Oscar Anderson with having, at the city of Minneapolis, in the place of business conducted by defendant Collins, on January 10, 1909, Sunday, sold a bottle of beer to A. B. Gates, contrary to the provisions of the ordinances of the city, and against the peace and dignity of the state. It is insisted by defendant that the complaint is insufficient, for the reason that it does not allege whether defendants were licensed saloon keepers at the time. The objection is not sound. It is immaterial whether they were licensed saloon keepers. The ordinance alleged to have been violated prohibits the sale of intoxicating liquors on Sunday by any one, and if the defendant Collins made the sale complained of he violated the law, whether he was in the saloon business or in some other business. The case of City of Jordan v. Nicolin, 84 Minn. 370, 371, 87 N. W. 916, is not in point. In that case the defendant, a licensed saloon keeper, was prosecuted for violating the provisions of the law regulating the conduct of his business, and to bring him within

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the law it was necessary to show that he was in fact a licensed dealer. Such is not this case.

2. It is also urged that there was a fatal variance between the allegations of the complaint and the proof, in that the complaint alleged the sale to have been made to one A. B. Gates, and the evidence showed it to have been made to Dr. F. A. Wright. If there was a variance in this respect, it is immaterial. It fully appears from the evidence that Gates, Dr. Wright, and Dr. Winters were informed by the Civic Federation of Minneapolis that defendant Collins was in the habit of entertaining Sunday customers and providing them with intoxicating liquors and they joined in an effort to ascertain the fact and obtain evidence against him, if true. They met at defendant's place of business, entered a room on the second floor, called a waiter, and ordered of him some refreshments, including whiskey and beer. Their order was filled, and the bill paid by Dr. Wright; but the beer, for the sale of which complaint is made, was ordered by Gates. Just which one of these parties, under the circumstances stated, paid the bill, is unimportant. The court would have been justified in finding a sale to either; for they were engaged in a joint undertaking, and were each principals in the purchase.

State v. Quinlan, 40 Minn. 55, 41 N. W. 299, is not in point. In that case the variance held fatal by the court was in the names of the persons charged with the violation of the statute. There the charge was made against Christ Snyder and William Bungord, while the proof showed the sale to have been made by Fred Vongard and Gotlieb Beisswinger. The court held the variance between William Bungord and Fred Vongard fatal, but that, as Beisswinger was sometimes known as Christ Snyder, the variance was immaterial.

3. The charge made in the complaint is that defendants John Collins and Oscar Anderson made the sale. The evidence is that Collins was conducting the business at the place of the transaction, and that Anderson was employed as a waiter or clerk, and filled the order given by Gates, Wright, and Winters. There appears a variance in the name of the waiter. The evidence showed that Oscar Lundgren performed that service, and not Anderson, but of this Collins cannot complain. State v. Quinlan, 40 Minn. 55, 41 N. W. 299.

4. It is further contended that the ordinance under which the conviction was had is void, because in violation of the constitution of the

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state, in that it permits the municipal court to impose a sentence of imprisonment, without the option of paying a fine, and does not provide for a jury trial. We have no constitutional provision granting to offenders the right to liquidate or discharge their violations of law by a fine, instead of imprisonment, or which extends to them any option whatever respecting the method of punishment. The ordinance, therefore, in providing for either fine or imprisonment, is not a violation of any of defendant's constitutional rights. Nor was defendant entitled to a trial by jury. City of Mankato v. Arnold, 36 Minn. 62, 30 N. W. 305; State v. West, 42 Minn. 147, 43 N. W. 845; State v. Harris, 50 Minn. 128, 52 N. W. 387, 531.

5. The point that the ordinance is void, because in conflict with the general statutes on the same subject, is disposed of by State v. Marciniak, 97 Minn. 355, 105 N. W. 965. The provisions of section 36, article 4, of the state constitution, to the effect that no charter or ordinance enacted thereunder shall supersede any general law defining or punishing crimes or misdemeanors, apply only to cities having home rule charters, of which class Minneapolis is not a member.

6. This covers all the questions requiring special mention. Though the punishment imposed upon defendant, forty days in the workhouse, may seem severe to him, it was within the authority of the court below to so adjudge, of which authority we have no revisory power. The evidence sustains the conclusion of the court that defendant Collins was cognizant of and authorized this particular sale by his clerk or waiter, and the judgment appealed from must be affirmed.

STATE ex rel. ALEX McDOUGALL and Others v. JAMES H. QUINN.[1]

April 30, 1909.

Nos. 16,246—(211).

Mandamus—Settling Proposed Case.

In proceedings to compel a trial judge to sign and certify a "case" as one containing all the evidence offered or received upon the trial, or pertinent to specific questions sought to be raised, the burden is upon the moving party to satisfy this court that his proposed case in fact contains all the evidence.

[1] Reported in 120 N. W. 1088.

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Certificate of Judge.

It is not the duty of the trial judge affirmatively to point out wherein the case is incomplete. His certificate that it does not conform to the truth is final, unless overcome by competent proof.

Order not Reviewable in Mandamus.

An order of the trial judge denying a motion to amend a proposed case after the time limited for the service thereof, or to extend the time and permit a new case to be proposed, is not reviewable in mandamus proceedings to compel an allowance and settlement of the case.

In the action of Nels Johnson v. Mary V. Roche, which was tried in the district court for Jackson county before Quinn, J., findings were filed and judgment was ordered in favor of plaintiff for the sum of $4,390.61, and thereafter judgment was entered therein pursuant to the findings. Subsequently judgment was ordered and entered for the same sum against George W. Wilson & Son, garnishees, upon their disclosure. Thereupon the proceedings stated in the first paragraph of the opinion were taken. Upon the return day of the order to show cause why the writ of mandamus should not issue, the order to show cause was discharged.

Geo. W. Wilson & Son, for plaintiffs.

Knox & Faber, for respondent.

BROWN, J.

This action was tried before the court below without a jury at the January, 1908, general term, and resulted in a judgment for plaintiffs, pursuant to findings and order therefor filed August 31, 1908. Thereafter a "case" purporting to contain all the evidence pertinent to certain of the findings to which exceptions were taken was served upon plaintiffs' counsel, who refused to accept the same on the ground and for the reason that it was served too late. No amendments were therefore proposed. Thereafter due notice was given that the proposed case would be presented to the trial judge for settlement and allowance on December 4, 1908, at which time counsel for plaintiffs appeared and opposed the allowance or settlement on the ground that the proposed case was not served in time. The court took the matter under advisement, and thereafter overruled plaintiffs' objections and signed and allowed the case, but declined to certify that it contained all the material evidence. Counsel then made a motion before the court, upon due

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notice, for an order settling the case as one containing all the evidence, which was, on January 20, 1909, the day following the hearing thereof, denied. Counsel then, on March 12, 1909, moved the court for an order permitting an amendment of the proposed case by adding thereto all the evidence received on the trial, or, if that were denied, for an order allowing the service of a new proposed case. Both motions were denied. Whereupon counsel proposing the case applied for and obtained from this court an order to show cause why a peremptory writ of mandamus should not issue commanding the trial judge to settle and certify the proposed case as one containing all the evidence, or to permit an amendment thereto by including all the evidence. The trial judge made return to the order, certifying to this court: (1) That the proposed case does not in fact contain all the evidence pertinent to the findings; and (2) that a motion to amend the proposed case, or to extend the time and permit a new case to be served, had been made and denied.

1. The order to show cause must be discharged. Though the procedure adopted to compel a settlement of the case is proper, there appears a square conflict between counsel and the trial judge upon the question whether the case in fact contains all the material evidence, and counsel have produced no evidence to this court showing or tending to show that the trial judge is in error. It is not the duty of a trial judge, in answer to an order to show cause why he should not sign and certify a particular case, when his refusal is based upon the claim that the proposed case does not conform to the truth, to demonstrate to this court the correctness of his contention. His certificate in controversies of this kind is prima facie correct, and the burden is upon the party asserting to the contrary to overcome it. No effort was made to do this in the case at hand; it being the contention of counsel that it was incumbent upon the trial judge to point out the particular evidence which he insists is material and should be incorporated in the record. But this contention is not sound. No complete transcript was presented to the judge below or to this court.

2. The motion for leave to amend the proposed case, or to be permitted to propose a new one, the time within which to do so having expired, was addressed to the discretion of the court, and the order denying it cannot be reviewed in this manner.

Order to show cause discharged.

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STATE v. DULUTH BOARD OF TRADE and Others.[1]

May 7, 1909.

Nos. 15,580—(32).[2]

Violation of Anti-Trust Statute—Restraint of Trade.

A combination, contract, or understanding, the direct and necessary effect of which is to stifle or restrict competition in trade or business, violates the anti-trust statute (chapter 359, p. 487, Laws 1899; R. L. 1905, § 5168), whatever may have been the intention of the parties.

Same.

A combination, the main purposes and effects of which are to foster the trade and increase the business of those who make and operate it, and which only indirectly and remotely restricts competition in trade or business, is not a "combination and conspiracy in restraint of trade," within the meaning of the statute.

Combination to Fix Wages.

An agreement or combination for the purpose of fixing and determining the value of wages or other charges for personal services is not within the prohibitions of the statute.

Combination to Regulate Business.

A combination formed by dealers in articles of a similar nature in a particular locality for the purposes of fairly regulating the methods of conducting business and providing rules for fair dealing among members, but which exercises no improper control over nonmembers and does not control prices or production, is not in contravention of the statute.

Board of Trade Rule.

Rule 26 of the Duluth Board of Trade which provides that all members of the board shall charge a uniform and determined rate of commission for selling grain for nonmembers, and provides penalties for the violation of such rule, is not in violation of the Minnesota anti-trust statute.

Duluth Board of Trade.

The Duluth Board of Trade, as constituted under its charter and rules, is not a conspiracy or combination in restraint of trade, or which restrains, limits, or interferes with free competition in the production of grain, or in the purchase and sale of grain at Duluth.

Same—Rule 26.

Rule 26 of the Duluth Board of Trade does not violate the Minnesota anti-trust statute, as its direct and necessary tendency is neither to re-

[1] Reported in 121 N. W. 395. [2] October, 1908, term calendar.

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strain trade by preventing competition in the business of buying and selling grain, nor to limit, fix, control, maintain, or regulate the price or production of any article of trade, manufacture, or use bought and sold within the state, nor to prevent or limit competition in the purchase and sale thereof.

Monopoly Defined.

The rules of the Duluth Board of Trade do not create, or tend to create, a monopoly. Trade and commerce is monopolized when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of a commodity and to thus practically suppress competition.

State Has Right of Appeal.

In a proceeding by the state against a corporation and its officers, charging them with the violation of the anti-trust statute, the state may appeal from a judgment in favor of the defendants.

Proceeding in the district court for St. Louis county to forfeit the corporate franchise of the Duluth Board of Trade, and to restrain it and its officers from further transacting business under its rules, on the ground that they violate the anti-trust statute (Laws 1899, p. 487, c. 359.) The case was tried before Dibell, J., who made findings and ordered judgment in favor of the defendants. From the judgment entered pursuant to the order, plaintiff appealed. Affirmed.

In this proceeding the state seeks to forfeit the corporate franchise of the Duluth Board of Trade, and to restrain it and its officers from further transacting business under the present rules on the ground that they violate the anti-trust statute of the state. The appeal is by the state from a judgment in favor of the defendants, and the record presents the question whether the conclusions of law are justified by the findings of fact. The facts stand conceded. It appears that the Duluth Board of Trade was incorporated January 31, 1881, under chapter 20, p. 35, Laws 1868, and now has and exercises the powers conferred by G. S. 1894, §§ 2982–2984, inclusive. The Minnesota Farmers' Exchange is a corporation organized under the laws of the state of Minnesota, having its office and principal place of business at Minneapolis, with power to own and operate mills for the manufacture of flour and other mill products, and to deal in grain, farm and dairy products,

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live stock, meats, agricultural implements and machinery, coal, lumber, and other articles.

The city of Duluth is one of the important terminal grain markets in the Northwest, and in the immediate vicinity thereof are found elevators, flour mills, and proper equipment for handling and marketing grain and other farm products. The board of trade does not buy, sell, or in any way deal in grain. Not more than twenty per cent. of those holding membership in the board are engaged in the grain or milling business at Duluth. Some are engaged in banking, marine insurance, and vessel agency business at Duluth, while others are engaged in the grain and other business outside of Duluth. The board merely furnishes facilities and conveniences for the transaction of the grain business, and to that end procures for its members information as to crop conditions and the grain markets of the world. It owns a building, of the value of $500,000, in which there is an exchange room, where actual trades are made and posted, and where grain is bought and sold. Persons engaged in the grain commission business, and others connected with vessel agencies and marine insurance, have their offices in this building. Two classes of commission men—those who sell for the owner grain coming into Duluth, and those who buy for the consumer at Duluth or Superior, or for transportation to lower lake ports or for foreign exchange—transact business on the floor of the board of trade. Practically all the grain bought and sold at Duluth is bought and sold on the board of trade, although some little grain, used for local consumption, is handled elsewhere.

The memberships in the board of trade, which originally cost $1,000 each, have all been disposed of, and are now held by various individuals. They are subject to sale, and the owners may become members of the board of trade upon certain terms and conditions prescribed by the board. The Minnesota Farmers' Exchange never applied for membership in the Duluth Board of Trade, and neither the board nor its officers or members in any manner conspired or combined to prevent the Minnesota Farmers' Exchange from having its grain handled or dealt in on the board, by threatening to boycott any member who might venture to handle its grain, or otherwise. Rule 27 of the board of trade provides that regular sessions shall be held from 9:30 a. m. to 1:15 p. m. daily, except Saturday, when trading shall cease at 12 o'-

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clock noon, and that no firm, member, or corporation shall buy or offer to buy, sell or offer to sell, any grain or seed on track, by sample or to arrive, except during such trading hours and on the floor of the exchange.

The state charges that the board and its officers have violated the anti-trust statute by adopting and enforcing what is known as Rule 26, which is as follows:

"The following rates of commission are deemed to be just and reasonable:

"GRAIN, ETC.

"Section 1. Receiving and selling on arrival, to arrive, or for some future month's delivery: Wheat, barley, rye, and flax, 1 cent per bushel; Durnum wheat, 1 cent per bushel; corn and oats, ½ cent per bushel; mill stuffs, 50 cents per ton; ground feed, 50 cents per ton; hay, 50 cents per ton, except that the minimum charge on hay shall be $5 per car. On sales to arrive, where delivery is not made, one-half of the above commission shall be charged.

"Sec. 2. Buying and shipping in cars in lots of less than 5,000 bushels: wheat, barley, rye, and flax, 1 cent per bushel; corn and oats, ½ cent per bushel. In lots of 5,000 bushels or more, not less than ½ cent per bushel.

"WAREHOUSE RECEIPTS.

"Sec. 3. Buying lots of not less than 5,000 bushels, ¼ cent per bushel; no charge for selling same receipts. Selling warehouse receipts, lots not less than 5,000 bushels, ¼ cent per bushel; lots less than 5,000 bushels, ½ cent per bushel.

"FOR FUTURE DELIVERY.

"Sec. 4. Buying and selling, ⅛ cent per bushel on lots of 5,000 bushels or more, and ¼ cent per bushel on lots of less than 5,000 bushels. Where delivery of warehouse receipts is made on such contracts, ¼ cent per bushel.

"Sec. 5. Between members of the Duluth Board of Trade, the rates of commission may be arranged without restriction.

"Sec. 6. In addition to the above there shall be charged such legit-

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mate expenses as are necessarily incurred in caring for the property and guarding the interests of both consignor and consignee, including interest on advances. Interest shall be charged on all advances made to country shippers or members of other exchanges.

"The minimum rate to be fixed each year during August, for one year, by a committee of three, appointed by the president. Nothing in this rule shall be so construed as to prevent any special arrangement between consignor and consignee, by which a higher rate of commission, or interest, may be charged in special cases.

"Sec. 7. Every member of the association, and every person, firm and corporation, admitted to trade, or to do business therein, who shall charge less than the regular rates of commission, and interest, established by the rules of the association; or shall assume, or rebate any portion of the same, or shall, with intent to evade in any way, directly or indirectly, the regular rate of commission, established by the rules of the association; or shall with intent to cut, or to evade in any way, directly or indirectly, the regular rates of commission established by the rules of the association, purchase, or offer to purchase, any grain, or seed on track, at any railway station outside of and for delivery at the city of Duluth, or Superior, or who shall purchase, directly or indirectly, for his own account or otherwise, from any person not a member of the association, any grain, seed, or other commodity, dealt in upon the board, without charging and deducting from the purchase price the regular rates of commission and interest, if any, established by the rules of the association; or shall make or report any false or fictitious sales or purchases; or shall resort to any method of accounting, directly or indirectly, in violation of or contrary in purpose and effect to a strict adherence to the regular established rates of commission of the association, or shall, with intent to evade the regular rates of commission established by the rules of the association, directly or indirectly pay or give, or offer so to do, any money, or other consideration of whatsoever nature, to any person, to procure or influence shipments or consignments of grain or seed in any form, or shall with intent to cut or evade in any way, directly or indirectly, the regular rates of commission established by the rules of the association, make use of any shift or device whatsoever, shall be deemed guilty of violation of the rules of the association establishing rates of commission, and, on

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conviction thereof, shall be fined by the association not less than $1,000 nor more than $2,000, as the board of directors may determine, such sum to be paid into the general fund of the association.

"Sec. 8. Any member of the Duluth Board of Trade, who shall become the agent of, or who shall handle grain on commission, or otherwise, for any person, firm, or corporation, when such person, firm, or corporation is known to be buying or handling, or has attempted to buy or handle, grain for less rates of commission than provided in this rule, such member shall be considered as having violated this rule, and be held subject to the penalties prescribed.

"Sec. 9. Any charge of the violation of the foregoing provisions, or any part thereof, shall be by complaint in writing, filed with the secretary of the association. The party charged shall be summoned by written notice from the secretary, and shall appear before the board of directors of the association, who shall investigate and try the charge.

"Sec. 10. The board of directors shall offer a reward, not exceeding $1,000, to any person who shall furnish evidence that does convict any member of the Duluth Board of Trade, or any firm, corporation, or party admitted to trade or to do business in the Duluth Board of Trade, of a violation of the established rates of commission; the object of this rule being to prevent the demoralization resulting from the giving, either directly or indirectly, of compensation to station agents, elevator agents, bankers, brokers, merchants, or any other parties, at any locality whatsoever, to influence shipments or consignments of grain. But this rule shall not prevent the regular employment, by members of this association, of traveling men, but shall prohibit a division of commissions with such traveling men, who are not resident members of this association.

"Sec. 11. Any member of the Duluth Board of Trade may at any time submit in writing to the board of directors any question for interpretation under this rule, and the question and its interpretation shall be posted on the board for at least ten (10) days, and henceforth be to all intents and purposes a part of this rule."

Rules, substantially like those of the Duluth Board of Trade, relating to the qualifications of members and the manner of their admission, fixing a minimum rate of commission that may be charged upon

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transactions for nonmembers, allowing rates and commissions between members to be arranged without restriction, providing for and charging interest upon advances, regulating the trading upon the floor of the exchange, and providing penalties by expulsion or suspension for violation of the rules, have been in force for many years in similar exchanges in New York, Philadelphia, Boston, Chicago, Minneapolis, Milwaukee, and elsewhere.

Edward T. Young, Attorney General; and *George W. Peterson,* Assistant Attorney General, for the State.

A trust is a contract, combination, confederation, or understanding between two or more persons to control the price of a commodity or service for their benefit and to the injury of the public. It tends to create a monopoly. State v. Firemen, 152 Mo. 1. Monoplies embrace two leading elements: An exclusive right or privilege on one side, and on the other a restriction or restraint on the public not existing before the monopoly was secured. In re Greene (C. C.) 52 Fed. 104; American Biscuit Mnfg. Co. v. Klotz (C. C.) 44 Fed. 721, 724. At common law monopolies were held unlawful as in restraint of trade and against public policy. 15 Am. & Eng. Enc. (2d Ed.) 847. The statutes now generally provide that unlawful combinations may be restrained by quo warranto or other appropriate proceedings. 27 Cyc. 908, note 58; R. L. 1905, § 5169. And it is generally agreed that these statutes are not in violation of the constitutional provisions guarantying liberty of property. State v. Firemen, supra; 27 Cyc. 910, note 83.

The grain and produce business is impressed with a public or quasi public character. From the time the grain reaches a country warehouse until it reaches a terminal point and is sold, and in the actual selling by commission men, the state assumes to control and regulate the grain trade.

The tests of illegality of combinations are: (1) The injury to the public. (2) A necessary consequence to control prices. (3) Limitation of production and suppression of competition. (4) Creation of a monopoly. The form assumed is immaterial in determining the question of illegality. Harding v. American, 182 Ill. 551. The statutes apply to existing combinations though formed before the passage of

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the statutes. In re Davies, 168 N. Y. 89; Ford v. Chicago, 155 Ill. 166; U. S. v. Trans-Missouri Freight Assn., 166 U. S. 290.

Under the anti-trust act of 1890, the test of illegality is not the reasonableness of the rates maintained by a combination, nor the intent with which the combination is entered into, nor yet its actual present effect, but the power it has or may have to produce the same or another or different effect in the future, such effect being restraint on trade and commerce. U. S. v. Trans-Missouri Freight Assn., supra; U. S. v. Joint Traffic Assn., 171 U. S. 505. Even at common law there was no question of reasonableness open to the courts with reference to such a contract. U. S. v. Addyston Pipe & Steel Co. (C. C. A.) 85 Fed. 271.

Rule 26 of the Duluth Board of Trade in and of itself is an unlawful restraint of trade, and an unlawful limitation upon open and free competition in the purchase and sale of grain, and, as such, a violation of the statute.

The opinion in Bohn Mnfg. Co. v. Hollis, 54 Minn. 223, that any man has a right to refuse to work for or deal with any man or class of men, and that this right, which one may exercise singly, any number may agree to exercise jointly, was rendered prior to the enactment of our anti-trust law and is inapplicable to the statute. The courts of Missouri and Indiana have shown the danger of attempting to apply the reasoning of the Bohn case to all combinations, regardless of their character. Jackson v. Stanfield, 137 Ind. 592; Ferd Heim Brewing Co. v. Belinder, 97 Mo. App. 64.

The vice of combinations lies in their possibilities. There are no saving features, either in intent, substance or effect, which can save Rule 26 from condemnation; neither its reasonableness, nor its limitations, nor the good intent in it, nor that it is justifiable and does not increase profits but lessens expenses and guards against other competition, nor that it may be a benefit to the public, and neither the fact that the board itself does no business.

Davis, Kellogg & Severance and *Sullivan & Grant*, for respondents.

This is an action brought to enforce a penalty for the violation of a criminal statute. It is not an information in the nature of quo warranto. Hence no appeal lies from a judgment of not guilty. It is im-

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material whether the proceeding be criminal in form by prosecution under indictment or complaint or civil in form. The real test is whether it is criminal in fact. If so, no appeal is allowed. The test is whether the purpose of the suit or proceeding is to vindicate private right or punish public wrong. If the latter, then the case is criminal and no appeal will lie. 12 Cyc. 796.

The statutes of Minnesota under which the defendant was incorporated, and subsequent laws giving it enlarged powers, fully authorize the adoption and maintenance of the rules in question. The statutes authorizing the incorporation of boards of trade and chambers of commerce, should both be so construed as to render neither nugatory. "It must be assumed that the law making body knew and had in mind the general system of law into which this statute was by it injected and that it was intended to operate in harmony therewith." Reeves v. Ross, 62 W. Va. 7, 11. Great effect should also be given to the practical construction of the statutes for many years.

A first, primary, and it would seem all-sufficient, answer to the claim made by the state, is that the anti-trust law does not cover, nor does it purport to cover, combinations or organizations of men who charge for personal services rendered. The law having been as stated in Gray v. Building Trades Council, 91 Minn. 171 and in Bohn Mnfg. Co. v. Hollis, 54 Minn. 223, we must conclude that the legislature designedly left out of the statute any reference to organizations of men who jointly fixed the price that they would charge for services rendered. This rule does not operate to permit a boycott. Ertz v. Produce Exchange of Minneapolis, 79 Minn. 140. It is clear that the defendant corporation is fully authorized to make and enforce the rules now in existence and that they are not in restraint of trade.

ELLIOTT, J. (after stating the facts as above).

The trial court found that the Duluth Board of Trade, as organized and conducted, is not an arrangement, conspiracy, or combination in restraint of commerce within the state; that it does not restrain, limit, interfere with, or destroy open and free competition in the purchase and sale of grain at Duluth; that competition between seller and buyer is active and free; that the board does not fix prices of grain, nor prevent nor limit competition in the purchase or sale of grain; but that

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the facilities which it furnishes are in aid of the traffic in grain from the point of production to the point of consumption.

1. The right of the state to appeal in a proceeding of this nature has been discussed by counsel at great length. The action is in form a civil proceeding, wherein the state seeks to obtain a judgment forfeiting the corporate privileges, powers, and franchises, dissolving the corporation, and disposing of its property, and enjoining the defendants and each of them from in any way continuing the alleged conspiracy, and from in any way interfering with, restraining, or limiting open and free competition in the sale and purchase of produce, in the Duluth market or elsewhere. It is authorized by the statute, and is a civil proceeding, notwithstanding the fact that the statute makes the prohibited acts criminal. Without entering upon an extended discussion of the question, we sustain the right of the state to prosecute the appeal.

2. The finding that there has been no conspiracy or boycott against the Minnesota Farmers' Exchange, and that it never applied for membership in the Duluth Board of Trade, leaves but one question to be determined, and that is whether, by the promulgation of rule 26 and the transaction of business thereunder, the defendant has entered into a combination, contract, arrangement, or conspiracy in violation of chapter 359, p. 487, Laws 1899.

The public policy of this state with reference to combinations and agreements which tend to restrain trade, and limit, restrict, or regulate the production, price, and distribution of articles of trade, manufacture, or use, has been declared by constitutional provisions and statutory enactments.

In 1888 there was embodied in the organic law of the state a declaration that "any combination of persons, either as individuals or as members or officers of any corporation, to monoplize the markets for food products in this state, or to interfere with, or restrict the freedom of such markets, is hereby declared to be a criminal conspiracy, and shall be punished in such manner as the legislature may provide." Const. art. 4, § 35. In 1891 the legislature enacted a statute denouncing as illegal all combinations to fix prices or to control the production of any commodity. Chapter 10, p. 82, Laws 1891. In 1899 the provisions of this statute were elaborated and re-enacted as chapter 359 of the

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Laws of that year, which was in force when the present action was commenced. It provided that:

"Any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust, or otherwise, hereafter entered into which is in restraint of trade or commerce within this state, or in restraint of trade or commerce between any of the people of this state and any of the people of any other state or country, or which limits or tends to limit or control the supply of any article, commodity or utility, or the articles which enter into the manufacture of any article or [of] utility, or which regulates, limits or controls or raises or tends to regulate, limit, control or raise the market price of any article, commodity or utility, or tends to limit or regulate the production of any such article, commodity or utility, or in any manner destroys, limits or interferes with open and free competition in either the production, purchase or sale of any commodity, article or utility is hereby prohibited and declared to be unlawful. * * *

"Any corporation heretofore or hereafter created, organized or existing under the laws of this state which shall hereafter either directly or indirectly make any contract, agreement or arrangement, or enter into any combination, conspiracy or trust as defined in section one (1) of this act, shall, in addition to the penalty prescribed in section two (2) of this act, forfeit its charter, rights and franchises, and it shall thereafter be unlawful for such corporation to engage in business, either as a corporation or as a part of any combination, trust or monopoly, except as to the final disposition of its property under the laws of this state."

With the exception of a provision prohibiting boycotting (chapter 194, p. 269, Laws 1901), no further changes were made in the law until the adoption of the Revised Laws of 1905, in which the act of 1899 appears in substance as sections 5168 and 5169. Section 5168 provides that: "No person or association of persons shall enter into any pool, trust agreement, combination, or understanding whatsoever with any other person or association, corporate or otherwise, in restraint of trade, within this state, or between the people of this or of any other state or country, or which tends in any way or degree to limit, fix, control, maintain, or regulate the price of any article of trade, manufacture, or use bought and sold within the state, or which limits or tends

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to limit the production of any such article, or which prevents or limits competition in the purchase and sale thereof, or which tends or is designed so to do. Every person violating any provision of this section, or assisting in such violation, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment in the state prison for not less than three nor more than five years."

A subsequent statute (chapter 252, p. 342, Laws 1907) makes it unlawful for persons or corporations handling grain at public warehouses in the state to enter into any combination, contract, agreement, or understanding with any other person or corporation owning or operating any other public warehouse at any railway station, whereby the amount of grain to be received or handled shall be equalized or pooled between such warehouses, or whereby the profits or earnings derived from such warehouses shall be divided or pooled or apportioned in any manner, or whereby the price to be paid for any kind of grain at such station shall be fixed or in any manner affected.

3. The Minnesota anti-trust law is framed along the lines of the federal statute, although it is more diffuse. It may fairly be assumed, however, that the general purpose of all statutes of this kind is the same, and we may therefore properly look to the decisions made under federal and state statutes of a similar character for the principle by which to construe our own statute. State v. Northern Securities Co. (C. C.) 123 Fed. 692. The first clause or part of the statute prohibits agreements and combinations in restraint of trade, thus following the language of section 1 of the federal statute (Act July 2, 1890, c. 647, 26 St. 209 [U. S. Comp. St. 1901, 3200]). This general language is then followed by provisions which specifically forbid combinations or agreements which tend in any way to limit, fix, control, maintain, or regulate the price or production of any article of trade, manufacture, or use bought and sold within the state, or which prevents or limits competition in the sale or purchase of the same. The statute thus specifically refers to such agreements as affect the price or production of articles of the kind named, or competition in the purchase and sale thereof.

We have reached the conclusion that, in view of the statutory powers of the Duluth Board of Trade, the nature of its business, and the services for which the uniform charges are required to be made, the agree-

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ment embodied in rule 26 does not constitute a combination, contract, or understanding in restraint of trade or commerce within this state, nor does it tend to limit, fix, maintain, control, or regulate the price or production of any article of trade, manufacture, or use, or to prevent or limit competition in the purchase or sale of the same, within the purview of the anti-trust statute. All cases of this character must be determined and controlled by their own facts, and before examining the anti-trust statutes and decisions, for the purpose of trying to find some controlling principle, it may be well to ascertain the statutory powers of the Duluth Board of Trade, the nature of its business, and the conditions under which it is carried on.

In 1868 (chapter 20, p. 35, Laws 1868) the legislature enacted a law which authorized any number of persons, not less than three, in any town or city having a population of more than three thousand, to proceed according to the provisions of title 3, c. 34, G. S. 1866, for the organization of corporations for purposes other than pecuniary, to "associate themselves and become incorporated as a chamber of commerce, or board of trade, for the purpose of advancing the commercial, mercantile and manufacturing interests of such city or town, for inculcating just and equitable principles of trade; for establishing and maintaining uniformity in the commercial usages of such city or town; for acquiring, possessing and disseminating useful business information, and for adjusting the controversies and misunderstandings which may arise between individuals engaged in trade, and for promoting the general prosperity of such city or town." The ordinary powers were conferred upon such corporations, and in addition thereto they were authorized to constitute committees of reference and arbitration and committees of appeals, to be governed by such rules and regulations as may be prescribed in the rules, regulations and by-laws, for the settlement of matters of difference between members of the association and other persons not members. They were authorized to "examine measures, weigh, gauge or inspect flour, grain, provisions, liquor, lumber, or any other article of produce or traffic commonly dealt in by the members of said corporation, and the certificate of such person or inspector as to the quality or quantity of any such article, or their brand or mark upon it, or upon any package containing such article, shall be evidence between buyer and seller, of the

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quantity, grade or quality of the same, and shall be binding upon the members of said corporation, or others interested, and requiring or assenting to the employment of such weights, measures, gauges or inspectors."

Chapter 20, p. 35, Laws 1868, was carried forward into G. S. 1878, where it became sections 197–199, inclusive, of chapter 34. Chapter 37, p. 54, Laws 1881, amended section 2, c. 20, p. 36, Laws 1868, and provided that corporations organized thereunder "shall have full power and authority to purchase, improve, hold, use, rent, mortgage, sell and convey such real and personal property as it may deem advisable, and may by resolution or by-law prescribe the terms and conditions of membership and the mode of admitting members; and in like manner may prescribe what officers it will have, their mode of election or appointment, and their functions and duties, and generally as to the management and transaction of all its business and affairs." In 1883 (chapter 138, p. 193, Laws 1883) the legislature enacted a new statute providing for the organization of chambers of commerce and boards of trade. This statute expressly legalized all such corporations which had been incorporated under chapter 20, Laws 1868, and chapter 37, Laws 1881, and conferred upon them all the power, authority, and jurisdiction conferred on such as should be organized under the new act. By this act the powers of such corporations were specifically stated and somewhat enlarged. The 1868 statute had provided that such corporations could be organized "for establishing and maintaining uniformity in the commercial usages of such city or town." The act of 1883 authorized their creation in counties, as well as in cities and towns—the restriction as to population being retained—and added, after "maintaining," the words "and enforcing." Fines for a breach of the rules, regulations, and by-laws might be imposed on the members and collected in the courts as in an action for debt. In 1887 (chapter 87, p. 138, Laws 1887) section 1 of the act of 1883 was amended so as to provide for the organization of chambers of commerce or boards of trade, or both, in any organized village, city, town, or county, without reference to the population thereof. The existing statute became sections 2982–2984, inclusive, subtit. 7, tit. 3, c. 34, G. S. 1894, and section 3112, et seq., R. L. 1905.

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The Duluth Board of Trade was organized January 31, 1881, under the 1868 statute, and two months before the enactment of chapter 37, Laws 1881. The articles of incorporation stated that: (1) "The general nature of its business is to establish and maintain uniformity in commercial usages; to inculcate just and equitable principles of trade; to adjust controversies and business disputes; to acquire and disseminate valuable business information, and particularly to maintain a commercial exchange, and to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits. The principal place of the transaction of said business is in Duluth, St. Louis county, state of Minnesota." (2) "The qualifications and terms of membership in this corporation shall be subject to such by-laws and to such fees and assessments as may be fixed by the board of directors from time to time." By virtue of the provisions of the subsequent statutes its powers were made the same as similar corporations organized under the later law. It has continued to exist until the present time, and R. L. 1905, § 2838, provides that "all private corporations existing and doing business at the time of the taking effect of the revised laws shall continue to exercise and enjoy all powers and privileges possessed by them under their respective articles of incorporation and the laws applicable thereto then in force. * * *"

It is through such organizations as the Duluth Board of Trade that the grain trade of the Northwest has been and now is largely transacted. The purposes for which such corporations may be created are stated in the statute and in the articles of incorporation of this defendant. The primary object is to furnish facilities for the proper conduct of business. The board of trade itself neither buys nor sells grain. It maintains an exchange room where the representatives of buyers and sellers meet and compete, and their competition results in trades in grain. It maintains telegraphic communication with other grain markets, and furnishes and posts information as to such markets and as to crop conditions generally. It has a building, in which its members engaged in the grain trade have offices, as do others who are connected more or less directly therewith. It is not claimed that the board fixes prices at which grain is purchased and sold. It collects and publishes statistics. It

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makes a market, in the sense that it keeps a record of actual transactions in the buying and selling of grain, thus making a Duluth market, in the sense that there is a Chicago and Minneapolis market. These things necessarily promote, instead of restrict, the grain trade. As said by the trial court, instead of limiting competition in the purchase and sale of grain, "the facilities which it furnishes are in aid of the traffic in grain from the point of production to the point of consumption."

The nature of the grain business seems to require peculiar and unusual facilities for its transaction. The grain is brought by the producer to local stations, where it is placed in elevators or sold to local buyers. It must then be shipped to terminal points, like Duluth or Minneapolis, to be there disposed of on the market. These great central markets are essential, not only for the preservation and storing of the grain in large quantities, but also in order that the business may be financed. At about the same time in each year great sums of money are required for this purpose, and it is stated that the banks of Minneapolis and Duluth furnish each year to the grain men from $40,000,000 to $50,000,000. This money, which is absolutely necessary for the moving of the crops, cannot be obtained unless the business is so organized and conducted as to minimize the risks resulting from fluctuating prices. Through these organizations the demoralization of prices of the products which constitute the basis of credits is prevented. These markets also enable parties operating elevator lines and purchasing large quantities of grain to sell for future delivery on each day substantially the amount of grain which they purchase at interior points, thus reducing the hazards of the business and enabling them to procure from financial institutions the funds necessary to move the crops.

The business of handling grain is of such a nature as to subject it to regulations which would be entirely unjustifiable if applied to a purely private business. It is because the business is of a quasi public nature that even the owner of a country elevator, who buys for himself alone and is his own grader and weighmaster, may be required to secure a license from the state. State v. W. W. Cargill Co., 77 Minn. 223, 79 N. W. 962; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619. For the same

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reason the legislature may make a weighmaster's certificate prima facie evidence of what is stated therein. Vega S. S. Co. v. Consolidated El. Co., 75 Minn. 308, 77 N. W. 973, 43 L. R. A. 843, 74 Am. St. 484. It may also require all persons who sell grain on commission to take out a license and execute a bond for the protection of persons who deal with them. State v. Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L. R. A. 442, 77 Am. St. 681; State v. Edwards, 94 Minn. 225, 102 N. W. 697, 69 L. R. A. 667. See generally State v. Brass, 2 N. D. 482, 52 N. W. 408; Brass v. North Dakota, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757; American v. Chicago, 143 Ill. 210, 32 N. E. 274, 18 L. R. A. 190, 36 Am. St. 385; New York v. Board of Trade, 127 Ill. 153, 19 N. E. 855, 2 L. R. A. 411, 11 Am. St. 107. The fact that a business is affected with a public use does not, of course, exempt it from the operation of the anti-trust statute. But the general policy of the law, which requires uniformity of charges by persons engaged in such business, may well have a bearing upon the construction of the statute. These conditions, which are matters of general knowledge, must be taken into consideration in determining whether the legislature, when it enacted the anti-trust statute, intended to interfere with the well-understood workings of boards of trade and chambers of commerce, which had been organized under statutes designed to afford proper facilities for the marketing of grain and other produce.

The legislatures and courts recognize that such organizations serve a useful and proper purpose in modern business communities, and no disposition has been shown to unduly restrict the exercise of their corporate powers and functions. Evans v. Chamber of Commerce of Minneapolis, 86 Minn. 448, 91 N. W. 8; McCarthy Bros. Co. v. Chamber of Commerce of Minneapolis, 105 Minn. 497, 117 N. W. 923. The Duluth Board of Trade was organized long before the enactment of the anti-trust law, under a statute which expressly authorized such corporations. Both statutes were subsequently embodied in the revised laws. The anti-trust statute applies to all persons, associations, and corporations, and the members thereof; but it should not be construed so as to destroy or cripple a legitimate, legally authorized business, unless such clearly appears to have been

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the legislative intention. But if the Duluth Board of Trade is transacting its business in a manner which is against the public policy of the state, it must change its methods or cease doing business. In order to determine what is forbidden by the statute, it is necessary to examine the common law and the statutes by which it has been declared and supplemented, as well as the construction which has been placed thereon by the courts. The evils sought to be remedied are general, and the statutes, national and state, are similar in purpose, though somewhat diverse in form.

4. To say that a combination restrains trade and prevents competition is a repetition of the same idea—the giving of two names to the same thing. Whatever restrains trade prevents competition, and whatever prevents competition in trade necessarily restrains trade. The word "monopoly," which plays so great a part in the law, conveys the same idea, because where there is monopoly there can be no competition. Production, and hence prices, are under the control of the monopolist, to the possible and probable injury of the public. Freedom of trade requires competition. Without one the other cannot exist, and whatever restrains the one restricts the other. It is true that unrestrained and unregulated competition may destroy what it it designed to preserve; but the theory of law and legislation still is that the welfare of the public requires that competition in trade and commerce shall exist, in order that freedom of trade may be maintained. To understand the language of the statute, it is necessary to know something of its history. The contract in restraint of trade, which originally fell under the condemnation of the common law, was one whereby a party bound himself not to follow some particular occupation, trade, calling, or profession, or to engage in some particular business for a period within a particular territory. From the earliest time the policy of the English law has been to discourage these voluntary restraints which tradesmen were induced to impose upon themselves, because they tended to deprive the community of the services of one of its members, and frequently tended to create a monopoly, and thus destroy the freedom of trade.

An early, and possibly the first, case in which a contract of this character was held void was decided during the reign of Henry

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V. Year Book, 2 Hen. V (1415). It appeared that a dyer had bound himself not to exercise his trade for six months in the same town with the plaintiff. After holding the contract void, the court indignantly exclaimed: "Per Dieu! If the plaintiff were here, he should go to prison until he had paid a fine to the king!" In 1602, in Colgate v. Bacheler, 2 Cro. Eliz. 872, it was said that it was against the law "to prohibit or restrain any to use a lawful trade at any time, or at any place; for as well as he may restrain him for one time or one place, he may restrain him for longer times and more places, which is against the benefit of the commonwealth." The reasons assigned for the invalidity of such contracts were that they disabled a man from acquiring a livelihood, thus depriving the community of the benefit of his labor, and possibly requiring it to support him and his family, and had a tendency to give the covenantee a monopoly of the trade from which he had thus excluded one competitor, and by the same means might exclude others. In the leading case of Mitchel v. Reynolds, 1 P. Wms. 181, decided in 1711, Chief Justice Parker declared that the courts should not approve such contracts, because of the mischief which might arise from them to the party by the loss of his livelihood and the subsistence of his family, and to the public by reason of depriving it of a useful member, and also because they enabled parties to obtain exclusive advantages in trade by reducing it into as few hands as possible. These reasons are more fully stated by Mr. Justice Morton in Alger v. Thacher, 19 Pick. (Mass.) 51, 31 Am. Dec. 119.

All restraints of trade were then thought to be unlawful; but in the course of time it was found that so rigorous and far-reaching a rule seriously interfered with ordinary everyday business transactions, and it was gradually relaxed until it is now the law of England and America that contracts in partial restraint of trade are valid, when reasonably necessary to protect the legitimate interests of the covenantee. It must, however, be a restraint which, under all the circumstances and conditions, is reasonable, and, as said by Tindal, C. J., in Horner v. Graves, 7 Bing. 735: "We do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in

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favor of whom it is given, and not so large as to interfere with the interests of the public." Nordenfelt v. Nordenfelt [1894] A. C. 535; U. S. v. Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. Ed. 315; Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230, 91 N. W. 892; National Benefit Co. v. Union Hospital Co., 45 Minn. 272, 47 N. W. 806, 11 L. R. A. 437; Gibbs v. Consolidated Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. 464. As stated in a recent English text-book: "The sole test of the validity of a contract in restraint of trade is its reasonableness in the interest of the covenantee", subject to the proviso that "the covenant must not otherwise offend against public policy." Matthews & Adler, Restraint of Trade, c. 2, p. 39 (1907).

If a contract is unreasonable according to this test, it is invalid at common law; and this, in the particular case, may be because of either or both of the reasons given by the judges in the earlier cases. It restricts the freedom of the individual, limits his capacity to utilize his labor and skill for the benefit of himself, his family, and the public, and prevents him from competing with the covenantee in the trade or business from which he is excluded, to the injury of the public, which is deprived of the benefits which result from the freedom of trade. But, as said by Judge Taft, in U. S. v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 85 Fed. 271, 282, 29 C. C. A. 141: "Where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint,—that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster."

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We have, then, two distinct kinds of contracts which the common law recognized as in restraint of trade: (1) Contracts per se in restraint of trade, whereby an individual contracts himself out of a trade; and (2) contracts which tend to destroy competition and thus create monopolies. Northern Securities Case, 193 U. S. 197, 403, 24 Sup. Ct. 436, 48 L. Ed. 679. The validity of the first class is determined by the reasonableness of the particular contract, while the second class are against public policy and invalid because of their tendencies, without reference to their reasonableness. The former are generally, if not always, ancillary to a valid principal contract, and, although technically in restraint of trade, are not within the purview of the anti-trust statute. Cincinnati, P., B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 26 Sup. Ct. 208, 50 L. Ed. 428; A. Booth & Co. v. Davis (C. C.) 127 Fed. 875; Espenson v. Koepke, 93 Minn. 278, 279, 101 N. W. 168. See Shawnee Compress Co. v. Anderson, 209 U. S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865.

The contracts or agreements in restraint of trade which fall under the condemnation of the anti-trust statute are of the second class, and are contrary to public policy because they have a tendency to prevent competition in trade and commerce. The Englishmen of the 1400's, blindly groping for some means of protecting themselves from unconscionable traders, adopted what now seems the absurd device of prohibiting entirely the buying and selling of certain articles for profit. They desired, if possible, to be free to deal with tradesmen who were themselves free to buy and sell without restraint. They therefore made the buying up large quantities of corn and other victuals with the intent to sell them again an indictable offense, because this of course must be injurious to the public by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. It will be observed that this act applied to victuals and breadstuffs only, but St. 5 & 6 Edw. VI, c. 14, made criminal the buying or contracting for any merchandise or victuals coming on the way to markets, or dissuading persons from buying their goods there, or persuading them to enhance the price when there, any of which practices makes the market dearer to the fair trader. 3 Stephen, History Crim. Law

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of England, 199, et seq. The owners of certain salt works were charged with raising the price of salt, and Lord Mansfield, in granting a motion to file an information against them for conspiracy, said: "If an agreement was made to fix the price of salt or any other necessity of life by people dealing in that commodity, the court would be glad to lay hold of an opportunity, from what quarter whatsoever the complaint came, to show them the sense of the crime, and that what rate soever the price was fixed, high or low, made no difference, for all such agreements are of bad consequence and ought to be discontinued." See Central v. Guthrie, 35 Oh. St. 666, 672. The act thus commented upon by Lord Mansfield is forbidden by modern anti-trust statutes, and expressly by the second part of the Minnesota statute. The old offenses of regrating, engrossing, and forestalling are no longer known to the law; but modern legislatures are still seeking a solution of the same problem—how to maintain the right to freely buy and sell the necessaries and conveniences of life in a market which is free from artificial and conventional restrictions.

More objectionable, because more far-reaching and detrimental to the public interests, were the special privileges enjoyed under grants from the crown, which were known as "monopolies." The technical monopoly, as distinguished from the practical monopoly of modern times, was a license or privilege, granted by the sovereign, to an individual for the sole buying and selling, making, working, or using, of anything whatsoever whereby the people in general were excluded from the liberty of manufacturing and trading, which they had before enjoyed. In 1 Hawkins, Pleas of the Crown (6th Ed.) 470, § 1, c. 79, a monopoly is defined as "an allowance by the king, to any person or persons, of the sole buying, selling, making, working, or using of anything, whereby any person is sought to be restrained from any freedom which he had before, or hindered from his lawful trade." It differed from engrossing only in that in the case of monopoly a patent was had from the king, while engrossing was a transaction between individuals. 4 Blackstone, Com. 159; 3 Coke, Inst. 181; Leeper v. State, 103 Tenn. 500, 53 S. W. 962, 48 L. R. A. 167.

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The practice of granting privileges of this character has been common in all countries, and still survives to a limited extent even in this country. The abuse of the power by Queen Elizabeth so stirred the people to righteous wrath and indignation that "the coach of the chief minister of the crown was surrounded by an indignant populace, who cursed the monopolies and exclaimed that the prerogative should not be suffered to touch the old liberties of England." 1 Macaulay, History of England, 50. In the Long Parliament Sir John Culpeper bitterly declared that the monopolists are "a nest of wasps or swarm of vermin, which have overcrept the land. * * * These like the frogs of Egypt have gotten the possession of our dwellings, and we have scarce a room free from them. They sup in our cup, they dip in our dish, they sit by our fire. We find them in the dye-fat, washboul, and powdering-tub. They share with the butler in his box. * * * Mr. Speaker, they will not bait us a pin. We may not buy our own cloaths without their brokage. These are the leeches that have sucked the commonwealth so hard that it is almost hectical. Mr. Speaker, I have echoed to you the cries of the kingdom. I will tell you their hopes. They look to Heaven for a blessing upon this parliament." As early as 1602 it was held in Darcy v. Allein (Case of Monopolies) Coke, pt. 11, 84b (1602), that such monopolies were void at common law. Darcy had been granted the exclusive right to make, import, and sell playing cards within the realm. The court held the grant void, because it was a monopoly and against the common law, for reasons which, when carefully analyzed, seem to reduce themselves to the single one that monopolies prevent competition and thus control prices. In 1625 Parliament by St. 21 James I, c. 3, forbade the granting of monopolies save in certain specified cases. Earl of Yarmouth v. Darrel, 3 Mod. 75; East-India Co. v. Sandys, Skinner, 132; 10 How. St. Tr. 371 (1684). Elaborate and instructive discussions of the history and nature of monopolies will be found in the opinions of Mr. Justice Story in Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. Ed. 773, and Mr. Justice Field in the Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394, and in Senator Nelson's report on the proposed amendment of the Sherman act, Report No. 848, 60th Cong. 2d Sess. (1909).

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The modern monopolies, against which the legislatures, courts, and people inveigh, are generally such as result indirectly from the legislative grant of some exclusive privilege, or the right to carry on a business which is dependent upon the existence of some special privilege or franchise. A practical monopoly may exist without the aid of a legislative grant, as it may result from the control of a trade or industry, brought about by means of contracts and combinations between competitors. In the modern sense, and within the meaning of the federal statute and the constitution and statute of Minnesota, trade and commerce are monopolized "when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of a commodity and thus to practically suppress competition." Noyes, Intercorp. Rel. (2d Ed.) § 389, and cases cited; National Cotton Oil Co. v. Texas, 197 U. S. 115, 129, 25 Sup. Ct. 379, 49 L. Ed. 689 (McKenna, J.). Like the ancient monopolies, the practical monopoly is under the ban of the law because it tends to prevent competition and enhance the price or deteriorate the quality of the commodity or service to which it relates. National Cotton Oil Co. v. Texas, supra; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; Harding v. American, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. 189.

From these analogous acts, which were illegal at common law, and under the English statutes, which became a part of the common law, it appears that the purpose in all the prohibitions was to preserve the freedom of trade by means of free competition between the traders themselves, in order that the public should not be required to pay exorbitant prices for articles of common use and necessity. It was to prevent any man or set of men from possessing the power to arbitrarily determine the price at which an article of common use shall be sold, because he who controls prices is the master of the world. The well-being of the trader, and the indirect benefit to the community through his activities, was also an important factor; but much of the solicitude for the individual which was manifested in the early decisions seems unnecessary to modern

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eyes, and plays a minor part in modern cases, which are determined by the test of public policy.

At common law contracts in restraint of trade were not unlawful in the sense of being criminal, nor did their breach give rise to a civil action. They were simply unenforceable. U. S. v. Addyston Pipe & Steel Co., supra; Mogul v. McGregor [1892] A. C. 25; Hornby v. Close, L. R. 2 Q. B. 153. Such contracts could not be enforced, nor could monopolies be legally enjoyed; but neither the making of the one nor the acquiring and enjoying of the other was a crime. A conspiracy to create a monopoly in commodities which constitute the necessities of life, or to enhance the market price therof, to the prejudice of the consumer, was and is a criminal offense at common law. See Morris v. Barclay, 68 Pa. St. 173, 8 Am. 159; Richardson v. Buhl, (Diamond Match Co.) 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; Nester v. Continental Co., 161 Pa. St. 473, 29 Atl. 102, 24 L. R. A. 247, 41 Am. St. 894; Chicago v. People, 114 Ill. App. 75; Pocahontas v. Powhatan, 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. 901; People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501; People v. Milk Exchange, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. 609; American Biscuit & Mnfg. Co. v. Klotz (C. C.) 44 Fed. 723; People v. Sheldon, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. 690; Harding v. American, 182 Ill. 551, 615, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. 189. A very complete collection of cases decided on common-law principles will be found in notes in 11 Am. Ry. & Corp. Rep. 388, 445, and 474 (1895). See also Noyes, Intercorp. Rel. (2d Ed.) cc. 35, 36.

5. The common-law rules were sufficient under ordinary conditions to protect the public and yet leave ample freedom for legitimate business transactions. But the astonishing material development of this country, with its opportunities for exploitation and the acquisition of great wealth, produced conditions which the common law, with its inadequate remedies, seemed unable to control. Competition was rapidly being eliminated from the business situation, with the result that the prices of most of the articles of everyday use were determined arbitrarily by men who controlled their

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production and distribution, instead of by the laws which are supposed to operate when trade and commerce is free from artificial restraints. These abuses led to the enactment of a series of statutes which are popularly known as "anti-trust statutes."

(a) The most important of these, because of the nature and magnitude of the interests affected, is the Sherman anti-trust statute of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." (26 St. 209, c. 647). Its terms are very general, and its prohibitions are against (1) contracts and combinations in restraint of trade and (2) attempts to monopolize trade or any part thereof. Section 1 provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal" and punishable as a crime. Section 2 provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor." The statute is made applicable to the District of Columbia and the territories, and its enforcement is provided for through criminal proceedings and the injunctional power of the courts. Individuals who are injured by reason of a violation of this statute are given a remedy by way of damages against the wrongdoer. To aid in its enforcement congress has enacted statutes providing for the prompt hearing of suits in equity instituted by the government and providing for special officers with ample funds under their control. U. S. Comp. St. 1901, 3200, et seq.; U. S. Comp. St. Supp. 1903, 376; Id. 366, 367. See also the anti-trust provision of the Wilson tariff act (Act August 27, 1894, c. 349, §§ 73–77, 28 St. 570 [U. S. Comp. St. 1901, 3202, 3203]) and the immunity proviso of Appropriation Act Feb. 25, 1903, c. 755, 32 St. 904 (U. S. Comp. St. Supp. 1907, 884).

The validity of the Sherman act as an exercise of the power to regulate commerce was sustained in the Joint Traffic Assn. Case, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. It embraces only agreements and combinations and acts which have direct connec-

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tion with interstate and foreign commerce; but such commerce comprehends intercourse for all the purposes of trade, in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between citizens of different states, and the power to regulate it embraces all the instrumentalities by which such commerce is conducted. Addyston Pipe & Steel Co. v. U. S., supra; Hopkins v. U. S., 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290. Its prohibitions are broader than those of the common law against restraints of trade. Trans-Missouri Freight Assn. Case, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488; Continental Wall Paper Co. v. Lewis Voight & Sons, 148 Fed. 939, 78 C. C. A. 567. It has therefore been held to apply to railroads and other public service corporations, and to prohibit all combinations or acts which cause restraint of interstate commerce, whether such restraint is reasonable or unreasonable. U. S. v. Trans-Missouri Freight Assn., 166 U. S. 290, 328, 17 Sup. Ct. 540, 41 L. Ed. 1007; Northern Securities Co. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; Pocahontas v. Powhatan, supra. It makes no distinction between classes of persons, and applies to combinations of laborers as well as capitalists. Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488. A combination to restrain a part of interstate commerce, whether reasonable or unreasonable, is as illegal as a successful monopolization of the whole of interstate commerce. The statute prohibits "any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business." Loewe v. Lawlor, supra. As construed by the circuit court of the second circuit, it makes illegal every combination by which competition is ended or suspended between two or more persons engaged in interstate or foreign trade or commerce. "Disregarding various dicta" said Judge Lacombe, "and following the several propositions which have been approved by successive majorities of the supreme court, this language is to be construed as prohibiting any contract or combination whose direct effect is to prevent the free play of competition, and thus tend to deprive the country of the serv-

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ices of any number of independent dealers however small." U. S. v. American Tobacco Co. (C. C.) 164 Fed. 700, 701.

The following combinations and agreements have been held illegal under the Sherman law: An agreement between certain railroad companies which provided for establishing and maintaining, for their mutual protection, reasonable rates, rules, and regulations in respect to freight traffic, through and local, and by which free competition between these companies was restricted. U. S. v. Trans-Missouri Freight Assn., supra. An arrangement between certain railway companies with reference to railroad traffic among the states, under which the railroads were not subject to competition among themselves, even though the contracts were in themselves reasonable. U. S. v. Joint Traffic Assn., supra. An agreement between certain private companies and corporations engaged in different states in the manufacture, sale, and transportation of iron pipe, whereby competition among them was avoided. Addyston Pipe & Steel Co. v. U. S., supra. A combination created by an agreement between certain dealers in tiles, grates, and mantels in different states, whereby they controlled, or sought to control, the prices of such articles in these states. Montague & Co. v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608. A combination of publishers and booksellers to fix prices and compel publishers and dealers, by means of rewards and punishments, to sell at the prices so fixed. Bobbs-Merrill Co. v. Straus (C. C.) 139 Fed. 155. See Scribner v. Straus (C. C.) 139 Fed. 193.

A contract or agreement whereby a holding corporation was created, to which the stockholders of competing parallel lines of railways, contrary to the laws of the state which created the competing companies, agreed to transfer the stock of both roads, was prohibited by the Sherman act, because it tended to destroy competition among carriers and create a monopoly of the traffic. Northern Securities Co. v. U. S., supra. In the so-called Beef Trust case it was alleged that the defendants were guilty of the following acts: (a) Directing their purchasing agents to refrain from bidding against each other at auction sales of live stock; (b) bidding up the price of such stock for a few days at a time, to influence large shipments, and then ceasing to bid in order to obtain the stock thus shipped at less than

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prevailing prices; (c) agreeing upon prices to be adopted by all, and restraining the output or quantity of meat shipped; (d) directing uniform prices for cartage and delivery throughout the United States as a device to increase the price to dealers and consumers; and (e) negotiating with carriers for secret rebates on their enormous shipments, thus bringing about unjust discrimination against other shippers and competitors, for the purpose of stifling and destroying competition. It was held on demurrer that these acts constituted an unlawful combination and conspiracy within the meaning of the Sherman act, because in restraint of trade and commerce. U. S. v. Swift & Co. (C. C.) 122 Fed. 529, affirmed Swift & Co. v. U. S., 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.

The owner of a patented article may impose restrictions upon its manufacture and sale, and, if the conditions are otherwise not illegal, they will not violate the Sherman act, even though the tendency is to restrain trade. The very object of the patent laws is to create monopoly. Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. But where the patentee went beyond the rights secured by the patent, in raising and maintaining prices in states where the patent had no practical existence, the contract was held forbidden by the Sherman act. Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. (C. C.) 142 Fed. 531, but see 154 Fed. 358. Contracts under which a board of trade furnishes stock quotations under certain conditions are not in restraint of trade at common law or under the Sherman act. Board of Trade of City of Chicago v. Christie Grain & Stock Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031.

(b) The federal anti-trust act necessarily applied only to contracts, combinations, and conspiracies in restraint of interstate and international trade and commerce, and soon after its passage the states began to enact similar statutes for the purpose of reaching agreements and combinations which were beyond the reach of the federal power. Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657, and National Cotton Oil Co. v. Texas, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689, sustain the power of the states to enlarge the common-law rules and prohibit combinations in restraint of trade within their borders, when such com-

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binations limit competition in the production or sale of articles, or increase or reduce prices in order to prevent free competition. The authority to pass such laws arises out of the police power. In Smiley v. Kansas, 196 U. S. 447, 456, 25 Sup. Ct. 289, 49 L. Ed. 546, the court, in sustaining the Kansas statute, said: "A secret arrangement, by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessaries of life is substantially destroyed, without any merging of interests through partnership or incorporation, is one to which the police power extends."

Anti-trust statutes of the same general character, although differing somewhat in scope and detail, are now in force in Arkansas (Act March 16, 1897, p. 60; Act March 6, 1899, p. 50); California (section 1673, Civ. Code; chapter 530, p. 984, St. 1907); Florida (chapter 4534, p. 60, Laws 1897, confined to beef and meats); Georgia (Laws 1896, p. 68); Illinois (Laws 1907, p. 216, amending Laws 1891, p. 206, and Laws 1893, p. 89, which were declared unconstitutional in Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679); Indiana (chapter 243, p. 490, Laws 1907; chapter 148, p. 257, Laws 1899); Iowa (Code, §§ 5060–5062); Kansas (Act March 8, 1897, p. 481, c. 265, sustained in Smiley v. Kansas, 196 U. S. 447, 25 Sup. Ct. 289, 49 L. Ed. 546); Kentucky (Ky. St. §§ 3915–3921 [Russell's St. §§ 3717–3723]); Louisiana (Act July 7, 1892, p. 120, No. 90; Const. art. 190); Maine (R. S. 1903, c. 47, §§ 53–55); Massachusetts (chapter 454, p. 409, Laws 1908); Michigan (Act No. 255, p. 409, Pub. Acts 1899); Minnesota (R. L. 1905, §§ 2098, 5168; chapters 252, 269, pp. 342, 363, Laws 1907); Missouri (Laws 1891, p. 186; R. S. 1899, §§ 8965–8977 [Ann. St. 1906, pp. 4150–4156]); Montana (Pen. Code 1895, c. 8, §§ 321, 325 [Rev. Codes, §§ 8285, 8289]); Nebraska (chapter 79, p. 347, Laws 1897); North Carolina (chapter 218, p. 254, Pub. Laws 1907); Oklahoma (chapter 83, p. 750, Laws 1907); New York (chapters 690, 727, pp. 1514, 1558, Laws 1899; Pen. Code, § 168); North Dakota (Rev. Codes 1899, §§ 7480–7484); Ohio (Bates' Ann. St. 1904, § 4427–1); South Carolina (Act Feb. 26, 1902 [23 St. at Large, p. 1057]); South Dakota (chapter 131, p. 196, Laws 1907; Rev. Pen. Code 1903, §§ 770–781); Tennessee

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(Act March 30, 1891, p. 428, c. 218; Act April 30, 1897, p. 241, c. 94); Texas (Laws 1907, p. 16, c. 12; Id. p. 194, c. 97; Id. p. 221, c. 120; Id. p. 322, c. 173, and chapter 10, p. 456, Laws 1st called Sess. 1907). The former statute was sustained in Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; National Cotton Oil Co. v. Texas, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689; Utah (R. S. 1898, §§ 321, 1758;. Const. art. 12, § 20); Wisconsin (chapter 219, p. 264, Laws 1893; St. 1898, §§ 1747e–1747g, 1791j). A convenient summary of these statutes will be found in Noyes, Intercorp. Rel. (2d Ed.) c. 41. The constitutions of Idaho (article 11, § 18), Kentucky (section 198), Louisiana (article 190), Maryland (Declaration of Rights, § 41), Minnesota (article 4, § 35), Montana (article 15, § 20), Utah (article 12, § 20), Washington (article 12, § 22), Wyoming (article 10, § 8), and Oklahoma (article 5, § 44), contain provisions concerning monopolies and trusts. See Stimson, Federal & State Const. § 580.

These statutes vary somewhat in their terms, and many cases have been decided under them. A reference to a few of the decisions will serve to illustrate the construction which has been placed upon the statutes by the state courts. The following have been held prohibited by the statutes:

A combination between corporations engaged in carrying freight and passengers by boat between points in different states, the purpose of which was to create a monopoly in the traffic. White Star Line v. Star Line, 141 Mich. 604, 105 N. W. 135, 113 Am. St. 551 (applies Sherman act). A contract whereby one party agrees to remain out of business, which is broader than is necessary to protect the covenantee, and which tends to restrain trade and create a monopoly. Anderson v. Shawnee, 17 Okl. 231, 87 Pac. 315, 15 L. R. A. (N. S.) 846, affirmed 209 U. S. 403, 28 Sup. Ct. 572, 52 L. Ed. 865. A contract having for its object the fixing and control of the price of farm machinery. International v. Com., 124 Ky. 543, 99 S. W. 637. An agreement whereby a corporation secured the exclusive right and privilege of marketing the products of the American Tobacco Company in New York City, the company controlling ninety per cent. of the tobacco business of the United States, the effect of which is to destroy competition. Locker

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v. American, 121 App. Div. 443, 106 N. Y. Supp. 115. A series of agreements whereby substantially all the building contractors of a particular locality agreed to buy brick exclusively from certain specified manufacturers, and by which the latter agreed to sell brick to such contractors only, and by which all the bricklayers in such locality agreed to handle only the brick of such manufacturers, obtained through such contractors; the purpose being to prevent competition and control the price of brick. Purington v. Hinchliff, 120 Ill. App. 523. The purchase by one corporation of the majority of the stock of another corporation for the purpose of controlling the latter and preventing competition. Dunbar v. American, 224 Ill. 9, 79 N. E. 423. It is immaterial that it would not result in a complete monopoly—citing People v. Chicago, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. 319; Distilling v. People, 156 Ill. 448, 41 N. E. 188, 47 Am. St. 200; Bishop v. American, 157 Ill. 284, 41 N. E. 765, 48 Am. St. 317; Harding v. American, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. 189. An agreement that all salt shall be purchased from a designated company for the period of two years, in connection with an agreement not to import salt and to discourage shipments by other parties. Getz v. Federal Salt Co., 147 Cal. 115, 81 Pac. 416, 109 Am. St. 114. A contract limiting the quantity of fish to be caught during the season. Attorney General v. Booth, 143 Mich. 89, 106 N. W. 868. A combination, the tendency and manifest intent of which was to prevent general competition, and thus control trade in a commodity and enable the members of the combination to dictate prices. "The ultimate object of the combination was to give to its members a monopoly in the retail coal business in their respective localities, thus enabling them to regulate prices independent of legitimate and healthful competition." Sanford v. People, 121 Ill. App. 619, 646. "All the cases, ancient and modern, agree that a combination, the tendency of which is to prevent general competition and to control prices, is detrimental to the public and consequently unlawful." People v. North River, 2 L. R. A. 33, 40.

The Texas statute (Laws 1903, p. 119, c. 94), prohibiting trusts and defining a trust as a combination of capital, skill, or acts of two or more persons to create or carry out restrictions in the free pursuit of any business authorized by the laws of the state, or to prevent or lessen com-

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petition in transportation, was held to be violated by a contract between a railway company and an express company, whereby the latter was given exclusive privileges and the former bound itself not to contract with others to do an express business on the road, and that, if privileges should be accorded others by legislative or judicial proceedings, the express company should have credit for the sums paid by the other corporations. "The contract in question shows by its own terms, that its purpose was to secure to the express companies, as far as it was in the power of the parties to do so, the exclusive right to do an express business upon the railroad, and to exclude other express companies from the enjoyment of like rights. * * * We conclude that there was the purpose to create and carry out a restriction in the free pursuit of a business," and that it was a combination of the capital, skill, and acts of both corporations. State v. Missouri, 99 Tex. 516, 526, 91 S. W. 214, 5 L. R. A. (N. S.) 783.

The Michigan statute (Act No. 255, p. 409, Pub. Acts 1899), which made it unlawful to contract not to sell any commodity below a fixed value, or to keep the price of an article at a fixed figure, or to settle the price of any article so as to prevent competition, or to combine or unite any interest connected with the sale of any commodity that its price may be affected, made illegal a contract, embodied in the rules of a master plumber's club, which provided that the price of supplies should be fixed by a committee, at which price all were to sell to the members of the exchange. The tendency was to create monopoly, and the court said: "It is no answer to say that this monopoly has in fact reduced the price. * * * That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree." Richardson v. Buhl, 77 Mich. 632, 660, 43 N. W. 1102, 6 L. R. A. 457; Hunt v. Riverside, 140 Mich. 538, 104 N. W. 40, 112 Am. St. 420.

The Nebraska statutes (chapter 114, p. 675, Laws 1887, and chapter 80, p. 352, Laws 1897), which prohibit combinations of grain dealers to fix the price of grain, do not exempt such dealers from the general anti-trust statute. State v. Omaha, 75 Neb. 637, 106 N. W. 979, 110 N. W. 874. The statutes forbid a combination to control and limit the price of milk. (Ford v. Chicago, 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298), a combination to control the price of beer (Houck v. An-

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heuser-Busch, 88 Tex. 184, 30 S. W. 869; Nester v. Continental, 161 Pa. St. 473, 29 Atl. 102, 24 L. R. A. 247, 41 Am. St. 894), a combination to fix the price of meats (State v. Armour, 173 Mo. 356, 73 S. W. 645, 61 L. R. A. 464, 96 Am. St. 515), a combination of merchants to compel another to sell goods at a price fixed by it (Brown v. Jacobs, 115 Ga. 429, 41 S. E. 553, 57 L. R. A. 547, 90 Am St. 126), a combination to control the production and fix the price of petroleum and its products (State v. Buckeye, 61 Oh. St. 520, 56 N. E. 464), an agreement among competing grain dealers that each will account, at so much per bushel, for all grain bought by him in excess of an allotted share (State v. Smiley, 65 Kan. 240, 69 Pac. 199, 67 L. R. A. 903), an agreement whereby a builder is to add á percentage to his bid and give it to an association of which he is a member (Milwaukee v. Niezerowski, 95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127, 60 Am. St. 97), an agreement between an association of master plumbers and a manufacturer to buy only from such manufacturer (Bailey v. Master Plumbers, 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561), and an agreement between such an association and a manufacturer that the latter will sell only to the association (Walsh v. Association, 97 Mo. App. 280, 71 S. W. 455). See Kosciusko v. Wilson, 90 Miss. 551, 43 South. 435, 8 L. R. A. (N. S.) 1053; Central v. Guthrie, 35 Oh. St. 666.

Many attempts have been made to bring unobjectionable transactions within these statutes, and a reference to some of the cases will serve to show the proper scope of the prohibitions. A contract not to sell any other whiskey of the same brand in the place where the buyer was engaged in business until the buyer had disposed of the quantity purchased was held not in violation of the Texas act of 1899 (Acts 1899, p. 246, c. 146), which prohibited agreements to fix or regulate the price of any article, to maintain such price when fixed, or to limit or fix the amount or quantity of any article. Norton v. Thomas, 99 Tex. 578, 91 S. W. 780. This statute was held not to condemn a contract whereby a sleeping car company was to furnish sleeping cars for a railroad company, and in which the only reference to prices was the stipulation that the sleeping car company might charge passengers on its cars on the trains of the railway company such fares as were customary on competing lines of railway where equal accomodations were furnished. No one had a right to run cars on the railroad, and there-

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fore "the free pursuit of any business authorized or permitted by law" was not restricted. The contract in no way interfered with the rights of any other sleeping car company, if any existed, to build and furnish its cars to railway companies. Ft. Worth v. State, 99 Tex. 34, 87 S. W. 336, 70 L. R. A. 950.

An agreement between a carrier and an association of citizens for special rates on excursion tickets does not violate either the state or federal anti-trust statutes. Lytle v. Galveston, 100 Tex. 292, 99 S. W. 396, 10 L. R. A. (N. S.) 437. In Hartz v. Eddy, 140 Mich. 479, 103 N. W. 852, it was held that a certain lease was not a part of the plan of a salt trust to limit the production of salt, raise the price thereof, and create a monopoly. In State v. Virginia-Carolina, 71 S. C. 544, 51 S. E. 455, it was held that the anti-trust statute should be construed to mean that the contract is against public policy when made with a view to lessen, or which tends to lessen, full and free competition to an unreasonable extent. In Wood v. Greenwood, 75 S. C. 378, 382–384, 55 S. E. 973, 9 L. R. A. (N. S.) 501, it was said: "A construction of the statute which would make obnoxious every contract which tends in any measure to affect the cost or price of articles to the producer or consumer * * * would probably render the statute liable to the objection that it unnecessarily and unreasonably abridges the freedom of contract guaranteed by the State and Federal constitutions. * * * In determining whether a particular contract falls within the inhibition of the statute, the court must necessarily consider the tendency or power of the contract to injure the public, either considered in itself or as part of a scheme to destroy or impede competition and control supply and prices. A contract may be lawful in itself as an isolated matter but yet be unlawful as a part of a scheme to create a virtual monopoly. * * * Every case, however, alleged to fall within the statute must be controlled by its own peculiar facts and circumstances, and we will not attempt to state any hard and fast rule by which every case must be governed. The main general test should be whether the contract, trust or combination is monopolistic in purpose or natural tendency. If so, it unreasonably affects competition and prices to the detriment of the public and is obnoxious to the statute." It appeared that a New York corporation had entered into a contract with a South Carolina corporation whereby the latter bound

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itself to sell certain articles for use only in G. and vicinity, to canvass the territory named for purchasers, and not to accept the agency for or sell similar articles during the term of the contract. The other party agreed to manufacture the articles and sell them to the South Carolina corporation, and to use reasonable diligence to prevent other agents from making sales of similar articles within the territory. This was held a minor contract in partial restraint of trade only, and not tending to prevent competition and restrain trade.

The rules of a live stock exchange, which provided for the expulsion of members who were guilty of commercial dishonesty, and forbade members from having any further commercial transactions with the person who had been expelled, were held not within the inhibition of the statute. The exchange, said the court, "does not seek to limit trade, nor to limit competition by refusing to buy from or sell to others for the reason that they are not members of its association. But they can boycott a member—or, rather, they can refuse to deal with him, not because he is not a member of the exchange, but because he has been found guilty and expelled from the association for his wrongdoing." Gladish v. Kansas City, 113 Mo. App. 726, 732, 89 S. W. 77. The case was distinguished from Heim v. Belinder, 97 Mo. App. 64, 71 S. W. 691, where certain brewers had an agreement that they would not sell to any one indebted to either of the others for beer until he had paid that debt. An agreement of that character, it was said, "tended to establish a monopoly, deprive the debtor of the benefit of competition, and to impose a penalty on his condition which was forbidden by the statute against trusts and pools." "The object of the statute" said the court in the Gladish case (page 733), "is to promote the public welfare, and not to outlaw harmless combinations, or those which are beneficial in their nature. This statute, like every other, should receive a reasonable construction. The purposes of the exchange are to be commended"—citing Haebler v. New York, 149 N. Y. 414, 44 N. E. 87; American v. Chicago, 143 Ill. 210; Board of Trade v. Nelson, 162 Ill. 431, 44 N. E. 743, 53 Am. St. 312; Belton v. Hatch, 109 N. Y. 593, 17 N. E. 225, 4 Am. St. 495. Of a contract by which one corporation bound itself to buy all its raw material from and sell all its manufactured products to another the court said: "We do not regard this contract as one in restraint of trade and, therefore,

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illegal and void. Nor do we think it is forbidden by the anti-trust law of this state, or by the Sherman act. There is neither allegation nor evidence here that this contract tended to produce a monopoly, or was in restraint of trade, or enabled the parties thereto, or either of them, to monopolize the market, or that it had anything to do with commerce." Heimbuecher v. Goff, 119 Ill. App. 373, 379.

The anti-trust statute does not affect a contract made by a seller of grain to sell to purchasers a certain amount of grain to be delivered in the future. Albers v. Spencer, 205 Mo. 105, 103 S. W. 523, 11 L. R. A. (N. S.) 1003. A contract to run for eight years, whereby an owner of a bed of fire clay agreed to erect a plant and operate it, and several corporations agreed to take a specified amount of the product daily at a fixed price—the first party agreeing not to operate a fire clay plant on any other land owned or controlled by him in the state, and the second party agreeing not to sell brick to any other parties, and the latter not to buy of any other party in the state, and not to enter into any combination or trust to limit the output of the plant is not invalid under the statute. After quoting the Illinois statute, Mr. Justice Wilkin said: "The object of these statutes is to prohibit the formation of trusts and combinations and remove all obstructions in restraint of trade and free competition. It was not the purpose of either law to hinder or prohibit contracts on the part of corporations or individuals made to foster or increase trade or business. But a contract may incidentally restrain competition or trade without violating the statutes if its chief purpose is to promote and increase the business of those who enter into it." The contract was regarded as one in partial restraint of trade only. Southern v. Garden, 223 Ill. 616, 621, 79 N. E. 313.

In Yazoo v. Searles, 85 Miss. 520, 37 South. 939, 68 L. R. A. 715, a car service association was held not to be a trust within the meaning of the statute of that state. This decision contains a very full discussion of the general subject. It was said that, in construing anti-trust statutes, the nature of the business contemplated by the contract and the tendency of the contract as affecting the public should be considered, rather than the interests of the parties to the particular contract. But the design of the legislature was to protect the public, not to unnecessarily restrict the transacting of business by either corporations

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or individuals. "The various kinds of legitimate business rendered necessary by the multiform demands of public convenience, the manifold callings which are an incident of this progressive age, all demand that the individual right of contract shall be given full sway, conditioned only that the rights of the public and the welfare of the people and the public policy of the state shall be held sacred. * * * The result desired—the purpose of the entire legislation—was to suppress trusts, secure the benefits arising from competition in trade, prevent monopolies, and protect the people from the possible tyranny and oppression of combined wealth."

A contract for the sale of the entire output of sash weights of a particular foundry at a specified price, and obligating the seller to withdraw a former lower price, is not invalid. Combinations between individuals or firms for the regulation of prices or competition in business are held not to be monopolies and in restraint of trade so long as they are reasonable and do not include all the commodity or trade, or to create such restrictions as to materially affect the freedom of commerce. Over v. Byram, 37 Ind. App. 452, 77 N. E. 302, 117 Am. St. 327; Herriman v. Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. 81.

6. Where the statute prohibits a specific thing, that fact, of course, furnishes an all-sufficient reason for the decision, and, as the state statutes generally go more into detail than the federal statutes, the state decisions are less controlled by general considerations. When the legality of the particular act is to be tested by whether it violates general statutory prohibitions upon restraints of trade or commerce, the courts give various reasons for their conclusions. Different forms of expression are used; but, when reduced to the lowest terms, it seems that if any one thing may be said to be the test, it is the effect upon competition. Combinations are not per se illegal, any more than are contracts, agreements, and understandings generally; but, when the purpose of either is to destroy competition in trade or commerce, the particular transaction falls within the prohibitions of the anti-trust statute. The acts which are specifically forbidden by the statute are contrary to the public policy of the state because they are thus forbidden (Stewart v. Erie & W. Transp. Co., 17 Minn. 348 [372]), and the effect upon competition furnishes a reasonably accurate test for cases which arise under the general language of the statute.

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The definition of monopoly involves the same principle, and contracts and combinations which tend to create a monopoly are against public policy, and therefore illegal, because they deprive the community of the benefits of competition and thus place the power to control production or fix prices in the hands of a few persons.

But it does not follow that every contract or combination which in any degree tends to restrict competition is illegal. So strict a rule would invalidate innumerable ordinary business transactions, which are unobjectionable and necessary that business shall not completely stagnate. As said in Hopkins v. U. S., 171 U. S. 578, 592, 600, 19 Sup. Ct. 40, 43 L. Ed. 290: "The contract condemned by the statute is one whose direct and immediate effect is a restraint * * * of commerce. * * * The act * * * must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it." The anti-trust statutes were never designed to forbid such transactions, and it has been universally held that contracts and combinations which tend to promote business, and which only remotely, incidentally, and indirectly restrain competition, are not forbidden. If the necessary effect of the combination is to stifle or to directly or necessarily restrict free competition, it is under the ban of the law, whatever may have been the intention of the parties. But if "it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect, are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation." Whitwell v. Continental Tobacco Co., 125 Fed. 454, 458, 60 C. C. A. 290, 64 L. R. A. 689; Hopkins v. U. S., 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson v. U. S., 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; U. S. v. Joint Traffic Assn., 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; Montague & Co. v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608; Cincinnati, P., B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 184, 26 Sup. Ct. 208, 50 L. Ed. 428; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. 863;

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Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; Welch v. Phelps, 89 Tex. 653, 36 S. W. 71; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. 465; Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91.

7. With these general principles in mind, we proceed to the consideration of the facts of the case at bar. It is reasonably clear that the purpose to be accomplished by rule 26 is not one which is forbidden by the anti-trust statute, and also that, even though it were within the scope of the statute, it is not illegal, because it does not destroy or restrict competition in the business of producing, buying, selling, or distributing any articles dealt in by the board of trade or its members. The requirement with reference to the rates on money advanced by the members and that relating to the division of commissions between members do not require any particular consideration. They clearly are not violations of the statute. The state's case must rest upon the alleged illegality of that provision of the rule which requires members to charge uniform commissions for their services in making sales for their customers. The other provisions are incidental to this, and are designed to secure its observance and enforcement. The board of trade is a combination of men engaged in the same business who have bound themselves by contract and agreement to charge uniform rates for personal services. It is the established law of this state that a man, or any number of men, may, unless under contract obligations, or engaged in an employment which charges them with a public duty, refuse to deal with any man or class of men, and that this right may be exercised singly or in combination with others. In Bohn Mnfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. 235, 319, the court said: "The right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultaneous declaration of their choice. This has been repeatedly held as to associations or unions of workmen, and associations of men in other occupations or lines of business must be governed by the same principles." In Ertz v. Produce Exchange, 79 Minn. 140, 143, 81 N. W. 737, 48 L. R. A. 90, 79 Am. St. 433, the court said that "within proper limits, it is both lawful and commendable for men to com-

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bine for the purpose of securing better wages or larger returns from their business ventures."

The right of laboring men to combine for the purpose of regulating their wages can no longer be seriously denied. Five years after the enactment of the Minnesota anti-trust statute this court, in Gray v. Building Trades Council, 91 Minn. 171, 179, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. 477, said: "A strike for the purpose of securing better wages or otherwise bettering the condition of the strikers is not unlawful, though the result thereof is a combination between the striking employees, and results incidentally in the injury of others." In Jacobs v. Cohen, 183 N. Y. 207, 212, 76 N. E. 5, 2 L. R. A. (N. S.) 292, 111 Am. St. 730, it was held that laboring men have the right "to combine and to co-operate for the promotion of such ends as the increase of wages. * * * Their combination is lawful, when it does not extend so far as to inflict injury upon others, or to oppress and crush them by excluding them from all employment, unless gained through joining the labor organization, or trades union." The right to form a combination for the purpose of fixing wages is now thoroughly established, and numerous cases sustaining it will be found cited in 24 Cyc. 819. A rule of law applicable to men who work with their hands should, when no other principle of public policy contravenes, be equally applicable, when the general purpose to be accomplished is the same, to men whose work is more intellectual.

If a combination for the purpose of regulating what one class of men in the community shall receive for their personal services is valid, because not within the scope of the anti-trust statute, it cannot be that any combination for the same purpose is prohibited because of the character or description of the individuals who enter into the combination. The classification must be along the line of purposes, and not persons. In the light of the history of legislation relating to agreements and combinations to fix and regulate wages, the often-declared rule of public policy with reference thereto, the purposes for which combinations are specifically forbidden by the statute, and the fact that such combinations affect production and prices of commodities but indirectly, we are of the opinion that combinations to fix and regulate the prices which shall be charged for wages and other forms of personal service are not within the prohibitions of our statute. Labor, wheth-

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er physical, intellectual, or a combination of the two, is not by any fair rule of construction an "article of trade, manufacture, or use," or an "article, commodity, or utility" which "enters into the manufacture of any article of utility," within the meaning of those words as used in the statute. Agreements to regulate the price of personal services, when standing alone, have never been held to be agreements in restraint of trade, and it is only when connected with other contracts and conduct which are in themselves illegal that they come within the purview of the federal anti-trust law.

In the recent case of Rohlf v. Kasemeier (Iowa) 118 N. W. 276, 278, it was held that under the Iowa statute, which prohibits combination to regulate the price of any "article of merchandise, commodity," etc., a union of laborers or professional men—in this instance physicians—for the purpose of advancing wages or charges is not unlawful. "If the contention of appellant be correct," said Deemer, J., "the statute covers all kinds of personal labor, both skilled and unskilled, under the term 'commodity.' Indeed, this is the broad claim made by counsel. Now, whilst there is a class of political economists who treat labor as so much merchandise, the wage being regulated simply by supply and demand, there is another class, which, taking account of the personal equation, sees in it something more than a commodity, and refuses to subscribe to the doctrine that supply and demand alone regulate the price. This latter class of economists refuses to accept the doctrine that a man is rich because he has stored away within him many days' work, and are convinced that his necessities, quite as often as the demand for his labor, fix the stipend which he is to receive. In other words, the laborer, skilled or unskilled, is not regarded as standing on an equality with him who barters in goods and merchandise. * * * The only ground upon which appellant can stand with any show of plausibility is that labor is a commodity to be bought, sold, or produced, as merchandise. This is a strained and unnatural construction, and gives to the word 'commodity' a meaning which is perhaps permissible, but is not the commonly accepted one. * * * It seems to be the almost universal holding that it is no crime for any number of persons without an unlawful object in view to associate themselves together, and agree that they will not work for or deal with certain classes of men, or work under a certain price or without certain conditions.

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Carew v. Rutherford, 106 Mass. 1, 14, 8 Am. 287; Com. v. Hunt, 4 Metc. (Mass.) 111, 134, 38 Am. Dec. 346; Rogers v. Evart (Sup.) 17 N. Y. Supp. 264, 268; U. S. v. Moore (C. C.) 129 Fed. 630."

It is possible that under some of the state statutes a combination to fix and regulate the value of wages or personal service is invalid, because included within the specific prohibitions of the statute. But the statutes almost without exception are directed to combinations which affect the production or price of some useful commodity, and it is very clear that personal services are not included under such designations. The Michigan statute of 1899 was broader than the Minnesota statute, particularly in that it denounced combinations of capital, skill, or arts. But in Hunt v. Riverside, 140 Mich. 538, 549, 104 N. W. 40, 112 Am. St. 420, the distinction between wages and articles which are produced, bought, and sold in the market was clearly recognized. It was held that, while agreements between plumbers fixing the price at which they would sell plumbers' supplies were illegal, agreements fixing and regulating the price of labor employed in executing lawful contracts were not forbidden. "If that statute" said the court, "forbids such agreements, it follows that it forbids all agreements fixing and regulating the price of labor, and that associations, whether of employees or employers, when endeavoring to fix and regulate the price of labor, are engaged in a criminal undertaking. Does that statute forbid such agreements? In general, it may be said that the statute forbids certain contracts and certain defined trusts. An agreement fixing and regulating the price of labor is not one of these contracts, nor one of these trusts. See Cleland v. Anderson, 66 Neb. 258. If it may be said that an agreement fixing the price of labor violates the statute when it forms part of an undertaking which the statute forbids, it must also be said that it does not violate the statute unless it does form part of some undertaking forbidden by the statute."

There has been some difference of opinion as to whether insurance is an article of commerce or a commodity within the meaning of such statutes. In State v. Phipps, 50 Kan. 609, 31 Pac. 1097, 18 L. R. A. 657, 34 Am. St. 152, and Beechley v. Mulville, 102 Iowa, 602, 70 N. W. 107, 71 N. W. 428, 63 Am. St. 479, it was held to be a "commodity." Some statutes expressly specify contracts fixing the rates to be paid for insurance and the commissions to be charged by insurance

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agents. In Queen v. State, 86 Tex. 250, 270, 272, 24 S. W. 397, 22 L. R. A. 483, it was held that neither under the common law nor the Texas anti-trust statute is it illegal to enter into a combination to establish uniform rates of insurance and of commissions to agents. The court said: "Labor is necessary to production and transportation, and therefore it is not merely an aid, but a necessity of commerce. It is advantageous to the public, and in that sense they have an interest in it. The services of professional men are likewise indispensable in most civilized communities, and are presumably likewise advantageous to the public. The public have an interest in them, in the same sense in which they have an interest in the business of insurance. It follows, therefore, that if insurance companies are to be brought within the rule that makes agreements to increase the price of merchandise illegal, upon the ground that the public have an interest in their business, agreements among laborers and among professional men not to render their services below a stipulated rate should be held contrary to public policy and void, upon the same grounds. Combinations among workingmen to increase or maintain their wages by unlawful means are unlawful. 'Encouragement to workmen in their endeavors to associate themselves into organizations for their mutual benefit, has settled beyond question that unemployed workmen may unite and agree not to work unless for a certain price. This is a plain right, upon which no doubt ought ever to have existed.'" People v. Fisher, 14 Wend. 9, 28 Am. Dec. 508.

More v. Bennett, 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. 216, seems to support the contention that a combination to fix the rate to be charged for personal services is illegal. That case grew out of an attempt of the law stenographers of the city of Chicago to fix the prices at which they would work. It is criticised in Queen v. State, supra, and the cases cited by the court do not seem to be applicable upon the facts. As a matter of fact, such stenographers furnish more than their personal services, and the compensation is measured by the quantity of the product of their labors. Thus in the ordinary case of a court stenographer, who furnished a transcript of evidence, the party ordering it pays for what he receives at a fixed price per folio. The proposition under consideration in More v. Bennett did not include ordinary stenographers who work by the day or month, and

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it cannot be that such persons cannot combine and co-operate for the purpose of fixing or raising their wages, while workingmen generally are permitted to do the same thing, with the approval of the law.

This conclusion is not inconsistent with the decision of the supreme court of the United States that the Sherman anti-trust law applies to combinations of workingmen as well as capitalists, or with the cases which have held certain anti-trust statutes unconstitutional because they exempted certain classes of people from their operation. The right of proper classification is conceded, and the statute must apply equally to all members of the class; but our statute is directed to combinations for certain purposes, and we hold that combinations and agreements, the sole and only purpose of which is to fix the charges that shall be made for personal services, are not within the prohibitions of the statute.

8. But, if it should be conceded that the agreement or combination effected by rule 26 is within the general scope and purpose of the anti-trust statute, it would not violate the statute because it does not create a monopoly, and its direct and necessary tendency is neither to restrain trade by preventing competition in the business of buying and selling grain on commission, nor to limit, fix, control, maintain, or regulate the price or production of any article of trade, manufacture, or use bought and sold within the state, nor to prevent or limit competition in the purchase and sale thereof. As already stated, the board of trade neither buys nor sells grain. The members act as the agents of the producers and purchasers of the grain, and the regulation of their commissions for such services can have no appreciable effect upon either the production or the price of the grain. It is a fixed charge, which must be paid, and the price which the producer obtains for the grain may be affected indirectly thereby. But the question is whether the production or price is directly or to any appreciable extent controlled or regulated by the rule which makes the charge uniform, instead of variable—definite and known, instead of uncertain and unknown. So long as the rate of commission is reasonable, as it is conceded to be in this instance, it must be for the benefit of the producer to know in advance what it will cost in commission to have his grain sold. A rule which determines the handling charges, and makes the charge the same per bushel to the farmer who ships one hundred sacks and the

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elevator company which ships one hundred cars, cannot be held to be against public policy. In fact public policy requires that such charges shall be definite, certain, and uniform, and this seems equally true as to commissions for sales, when made under the peculiar conditions under which the grain business is conducted. A board of trade which requires its members to treat all its customers exactly alike in the matter of charges for services no more destroys competition than does a railroad when it charges all shippers the same rate for conveying freight.

It is common knowledge that competition between commission men for the business of the producers is in fact strong, and success in getting the business depends, not upon offering to transact it for less than the uniform rate of commission, but upon the skill and facilities possessed for obtaining the highest price for the grain from the elevator and mill men who are generally the purchasers. There is no fixed price at which sales must be made. If A. can secure a cent a bushel more for B.'s grain than can C. or any other commission man, he will get the business, and the producer who has selected him to make the sale will get the benefit of his superior skill and energy. Competition of this character exists on all boards of trade and chambers of commerce, and it is inconceivable that a rule which requires all the commission men who are members of the board or chamber to charge the same rate of commission for the same service can materially affect or control either the production of grain or the price at which it sells. Of course, in a remote and indirect way, every charge and item of expense which attaches to the marketing of grain or other products affects to some extent the prices received by the producers and paid by the ultimate purchaser. But contracts and agreements for certain and uniform charges, which are for the benefit of all and operate only indirectly on production and prices, are not within the prohibitions of the statute.

The purpose and effect of this rule are not to stifle competition, but to protect the members of the board, and foster their business and trade, and prevent it from becoming demoralized to the injury of all parties, including the consumer. The propriety of such rules, indirectly, at least, received the approval of the supreme court of the United States in Anderson v. U. S., 171 U. S. 604, 616, 19 Sup. Ct. 50, 43 L. Ed. 300, where Mr. Justice Peckham said: "From very early times it has been the custom for men engaged in the occupation of buying

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and selling articles of a similar nature at any particular place to associate themselves together. The object of the association has in many cases been to provide for the ready transaction of the business of the associates by obtaining a general headquarters for its conduct, and thus to insure a quick and certain market for the sale or purchase of the article dealt in. Another purpose has been to provide a standard of business integrity among the members by adopting rules for just and fair dealing among them and enforcing the same by penalties for their violation. The agreements have been voluntary, and the penalties have been enforced under the supervision and by members of the association. The preamble adopted by the association in this case shows the ostensible purpose of its formation. It was not formed for pecuniary profits, and a careful perusal of the whole agreement fails, as we think, to show that its purpose was other than as stated in the preamble. * * * And that the result naturally to be expected from an enforcement of the rules would not directly, if at all, affect interstate trade or commerce."

We think the same statement may be made with reference to the rules of the Duluth Board of Trade in their relation to intrastate trade and commerce. In a recent text-book written by one of the judges who decided the case of U. S. v. American Tobacco Co. (C. C.) 164 Fed. 700, which makes the restriction of competition conclusive, it is said that, "in order to come within the provisions of the federal statute, the direct effect of a combination must be in restraint of interstate commerce," and "that a voluntary association or 'exchange' formed by dealers in articles of a similar nature in a particular locality for the purpose of fairly regulating the methods of conducting business and establishing a general headquarters, and the by-laws of which provide rules for fair dealing among the members, but which exercises no control over prices or production, is not in contravention of the statute. Neither the object nor consequence of such an association is to suppress competition and its effect upon interstate commerce, if any, is remote." Noyes, Intercorp. Rel. (2d Ed.) § 395.

Anderson v. U. S., 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300, and Hopkins v. U. S., 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, while not exactly in point, tend to sustain the respondent's views as to the legality of this rule of the Duluth Board of Trade. The case

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which comes the nearest to sustaining the appellant's contention is State v. Wilson, 73 Kan. 334, 80 Pac. 639, 84 Pac. 737. That was a criminal prosecution of the defendant upon the charge of obtaining money under false pretenses, by selling cattle which he represented to be free from incumbrance when in fact they were covered by a mortgage. The defense was that the mortgage was void, because based upon a transaction which was made criminal by the Kansas anti-trust statute. The defendant offered to prove that the mortgage was given to a member of the Kansas City Live Stock Exchange, which was an association of persons engaged in buying and selling live stock for others and practically controlling that business at Kansas City; that a by-law of such association forbade a member from charging a less commission for such services than fifty cents a head; and that a part of the consideration of the notes, to secure which the mortgage was given, was a charge for the services of the mortgagee in purchasing the cattle covered by the mortgage. This evidence was excluded, and for the error alleged to have thus been committed the defendant demanded a new trial. The statute forbade combinations of "capital, skill and acts" for various enumerated purposes, one of which was "to create or carry out restrictions in the free and full pursuit of any business authorized or permitted by the laws of this state." It was held that the Kansas City Live Stock Exchange was an illegal organization within the meaning of this section of the statute. The statute was quite specific, and may well have been designed to reach such a case; but it is not a controlling authority in favor of the appellant, under our statute, upon the facts disclosed by this record.

A somewhat extended investigation of the law and careful consideration of the facts of this case have convinced us that the Duluth Board of Trade has not violated the Minnesota statute, and that the decision of the learned trial judge was correct.

The judgment is therefore affirmed.

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JOHN WALIGORA v. ST. PAUL FOUNDRY COMPANY.[1]

December 18, 1908.

Nos. 15,786—(74).

Negligence—Contributory Negligence.

Plaintiff was injured while using an air hoist, peculiar in this: That the arms by which the load was raised or lowered were in a position opposite to that which they occupied on some fifteen other hoists in the same shop. This hoist, during plaintiff's absence, had been moved from another part of the room to the place where he was working. An air valve had leaked before the accident. Another servant had undertaken to repair it. Plaintiff was not advised of the change in the position of the hoist. To lower a load which he had raised, he used the raising chain instead of the lowering chain. The load went up rapidly, struck the cylinder, was jarred from the grabs, fell, and injured the plaintiff. It is *held:*

1. That plaintiff had borne the burden of showing negligence on the part of the defendant.

2. That there was no reversible error in the charge of the trial court.

3. That the plaintiff was not guilty of contributory negligence as a matter of law.

4. That plaintiff's verdict was not excessive.

Charge to Jury.

The use in the charge of the trial court of the inaccurate formula, "There is a duty resting upon the employer to furnish a reasonably safe place to work," to which its attention was not called until the jury had retired, is *held*, under the circumstances of this case, not to have constituted reversible error.

Action in the district court for Ramsey county to recover $25,000 for injuries received by plaintiff while in the employ of defendant. The manner in which the injury occurred is stated in the opinion. The case was tried before Orr, J., and a jury which returned a verdict for $5,000 in favor of plaintiff. From an order denying its motion for a new trial, defendant appealed. Affirmed.

The air hoist referred to in the opinion consisted of a round air chamber or cylinder about eight feet long, in which a piston or rod

[1] Reported in 119 N. W. 395.

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with a hook on its lower end was caused to rise by admission of compressed air into the cylinder, or to fall by the expulsion of the air therefrom. The flow of air into and from the cylinder was controlled by valves which were moved by arms on its face with a chain on the end of each arm for the use of the operator, one of which was pulled to raise and the other to lower the load. At the end of the chain was a cast-iron label or handle with the words "lower" or "hoist." On the other hoists in the shop the right hand chain would lower the load, the left hand chain would raise it. In operating the hoists the men generally held both chains so that the movements could thereby be readily adjusted, though the hoists had also springs and eveners, so that when the operator released a chain which he had pulled to lift or lower a load, the arm would go back to place and the motion of the hoist would stop. When plaintiff started to pull the chain the load was four feet above the ground. The distance which the load traveled was sixteen inches, the extreme height to which the rod grabs in use would permit the load to be raised. The other facts are stated in the opinion.

Keith, Evans, Thompson & Fairchild, for appellant.

Moritz Heim, John D. O'Brien, and *John Dillon O'Brien,* for respondent.

JAGGARD, J.

Plaintiff and respondent, a man forty years of age, who had been ten years in the employ of the defendant and appellant, and for the last eighteen months of which he had worked in the "steel shop" here involved, was injured while using an air hoist. There were some fifteen of these hoists in the shop. On this hoist alone the position of the arms was reversed, so that the chains to raise and lower the load were in a position opposite to that which they occupied on the other hoists. The chain to raise the load on this hoist was where the chain to lower the load on the other hoists was placed. This hoist had long been in service in another part of the shop, but whether respondent had ever worked with it was not shown. During the illness of plaintiff, from which he had just returned to work the morning of the day on which the injury occurred, it had been installed in the other part of the shop, where the plaintiff went to work.

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He had not been advised that the hoist which he was using was "reversed" in its action. Plaintiff and his helper were engaged in transferring four large plates of iron, placed one on top of another and weighing about one thousand pounds. They were supported on the hoist with a single pair of what were known as "rod grabs," which consisted of two round rods, made of steel, attached at one end to an iron ring in such a way that they could be spread like tongs, and at the other end turned at an acute angle and extended, forming a hook one and three eighths inches long. Plaintiff, having raised the load from the ground, pulled the chain corresponding in position to that one which on the hoists generally was the lowering chain, but which, because of the reverse arrangement on the hoists he was using, was the raising chain. The load, in consequence, went up, instead of down. The hoist did not stop automatically. Therefore the load went up rapidly, the piston struck hard against the end of the cylinder, and the plates were jarred from the grabs and fell upon him.

The jury returned a verdict of $5,000. This appeal was taken from an order of the trial court denying defendant's motion for a new trial.

1. As to the defendant's negligence, the questions argued pertain to the sufficiency of plaintiff's proof to bear the burden of showing defendant's negligence in each of four different particulars and on the propriety of the charge of the court with respect thereto. It will conduce to brevity to consider these questions together. The allegations of negligence, according to defendant's brief, were that "the hoist (1) was reversed; (2) very quick-acting, of much greater speed than the others; (3) would not stop its motion when the appropriate chain was released, but had to be controlled by using the opposite chain; and (4) was also so defectively constructed and maintained that it would not hold its load." It is conceded that as to the first allegation there was sufficient evidence, and that as to the third allegation there was "some evidence," to sustain the complaint. An examination of the record has satisfied us that such evidence was sufficient, within the familiar rule on that subject.

Defendant's essential argument is that the second and fourth claims of negligence have not been established. With respect to the second, there was direct testimony that the machine was very quick-acting and of much greater speed than the others. One witness testified:

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"It worked rapidly. It worked altogether different from the other ones." Another said: "It was a very quick-acting machine." Defendant argues, however, that there was error in submitting this to the jury, because the air by which the hoists were operated came from the same reservoir, through the same main, and through supply pipes to the different hoists which were all the same size and capacity, whereby the loads were raised only as the cylinder filled with air, which was at an equal pressure in each hoist. He insists that in consequence one cylinder could not be filled at a greater rate of speed than another, and that the testimony in contradiction of these physical facts raised no issue, and should not have been credited by either the court or jury. Missouri, K. & T. Ry. Co. v. Collier (C. C. A.) 157 Fed. 347; Chybowski v. Bucyrus, 127 Wis. 332, 106 N. W. 833, 7 L. R. A. (N. S.) 357. It appeared, however, that an imperfection in the spring which closed the air valves after they had been opened by the controller, or in the seating of the valve, had caused a leak, and that shortly before the accident an attempt to repair had been made. The question then arose whether the court could say, as a matter of law, that the defective spring, by not performing its proper function, or the improper seating of the valve itself, might not have been the cause of the "quick acting" of the machine. We conclude that there was no error in the charge of the court in this regard.

With respect to the fourth charge of negligence, the defendant insists that the court erred in charging the jury that the complaint in said action contained, inter alia, an allegation that "the hoist would not hold its load." This assignment is not well taken. The complaint expressly alleges, inter alia, that "said hoist was also so defectively constructed and maintained that it would not hold its load." There was, therefore, no variance between the complaint as the court read it to the jury and the complaint as it actually was. The court did not, however, submit to the jury that precise issue. The whole charge in that connection was as follows: "The question as to the rapidity with which it [the hoist] moves, whether it is faster than the others; the question as to whether it was defective; the question whether * * * it necessitated the pulling of the opposite chain in order to stop after having been put in motion one way or the oth-

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er—are in issue, are disputed. These are the questions, therefore, that must be determined by you." The evidence as to the spring and of the action of the machine, which have been referred to, was sufficient to submit to the jury the issue as to whether or not the hoist was defective. If there was any departure between the language of the complaint and the charge of the court, the appellant should have called the court's attention to it before the case was finally submitted to the jury. Consideration of the whole record, however, has led us to conclude that there was no such variance.

Objection was also made to that part of the court's charge: "There is a duty resting upon the employer to furnish a reasonably safe place in which to work." In Poczerwinski v. C. A. Smith Lumber Co., 105 Minn. 305, 117 N. W. 486, a charge similar to the one here in issue was held upon that record not to have constituted reversible error. The correctness of that ruling is so earnestly challenged here that, while we think it is obviously correct, we are constrained to state its rationale somewhat at length. It is elementary that this language, taken by itself, is not a strictly accurate statement of the general rule of law. Its fault is that the liability is rested on the actual condition of the place, irrespective of what care has been exercised, instead of being based on the degree of care observed by the master. None the less, the court's charge, taken as a whole, fully submitted the negligence of the defendant as the issue to be tried, and expressly negatived the idea that the master was, in its own language "required to furnish the safest and best instrumentalities," or that "the master was an insurer."

Defendant lays great stress upon the decision in Armour & Co. v. Russell, 144 Fed. 614, 75 C. C. A. 416, 6 L. R. A. (N. S.) 602, in which it was held that the charge of the court, which stated the true rule on the subject, but also contained the error immediately complained of, entitled to a new trial on the legal presumption that error produces prejudice, and that it is only when the facts appear so clearly as to be beyond doubt that the error did not prejudice, and could not have prejudiced, that the rule that error without prejudice is no ground for reversal is applicable. That authority does not control here, for two reasons: In the first place, the rule as to presumption

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of prejudice from admitted error is not so rigid in this state as in this federal circuit. In the second place—and what is of conclusive force—in the federal court, in accordance with common-law practice, exceptions to the charge are taken before the jury retires. In this state, under the statute, exceptions may be taken subsequently. To avoid unnecessary mistrials, and to render futile the objectionable "quest for error," this court has established a plainly proper rule, which has been repeatedly followed, viz.: "The firmly established practice in this state requiring counsel on the trial of an action to call attention to obviously unintentional misstatements and verbal errors in the charge of the court to the jury, if deemed at all likely to be misleading, was not abrogated by the passage of Laws 1901, c. 113," etc. Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754.

The question, then, resolves itself into whether this present instruction falls within this rule. The formula of the trial court was a few years ago in general—indeed, almost universal—use. Thus in Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 353, 16 Sup. Ct. 843, 40 L. Ed. 994, Mr. Justice Peckham said: "There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties," etc. In Northern Pacific R. Co. v. Babcock, 154 U. S. 190, 200, 14 Sup. Ct. 982, 38 L. Ed. 958, Mr. Justice White said: "The obligation of the employer to furnish to his employee sound implements is established." The same terminology was also employed in Kinnear Mnfg. Co. v. Carlisle, 152 Fed. 933, 82 C. C. A. 81; National v. Carlson, 155 Ill. 210, 40 N. E. 492; Lewis v. Seifert, 116 Pa. St. 628, 647, 11 Atl. 514, 2 Am. St. 631; Schminkey v. Sinclair, 137 Iowa, 130, 114 N. W. 612; Roach v. Haile, 71 S. C. 79, 50 S. E. 543, 544; Marks v. Harriet, 138 N. C. 401, 50 S. E. 769, 3 Am. & Eng. An. Cas. 812; and in uncounted scores of other cases. The language which, as thus ap-

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pears, has been used deliberately and repeatedly by eminent judges of courts of error, and has had judicial sanction for many years, is not the best or most precise. That a jury would be deceived because it discovered a distinction which escaped those eminent jurists for so long a time is not probable; but, if counsel for defendant thought this probable, they could and should have called it to the attention of the trial court before the jury retired.

2. The questions as to plaintiff's contributory negligence were, we think, properly submitted to the jury. The change in the situation with which the employee had been familiar was a proper consideration in determining both contributory negligence and assumption of risk. See Huizega v. Cutler , 51 Mich. 272, 16 N. W. 643; White v. Nonantum, 144 Mass. 276, 11 N. E. 75; Barbo v. Bassett, 35 Minn. 485, 29 N. W. 198; Craver v. Christian, 36 Minn. 413, 31 N. W. 457, 1 Am. St. 675. This conclusion is not altered by the fact that at the end of the chains were cast-iron labels or handles on which were raised words, showing which handle was to raise and which to lower the load. The words "lower" and "hoist," plaintiff says, he did not see, because the lowering chain was out of sight on top of the load, which at that time was about four feet above the ground. Moreover, the obscuring of the light by smoke, the distance the plaintiff was from the labels or handles, and the angle at which they were suspended, directly affected the notice they were intended to convey. Nor was plaintiff necessarily, as a matter of law, negligent in using the rod grabs previously described, rather than one of the other devices supplied by the defendant for that purpose, viz., certain chain grabs, which consisted of chains, at one end of which were flat pieces of steel between two and three inches broad, with a hook from three to four inches long, and also chains ending with a ring, so the load could be held tight by a slip-knot arrangement. The proximate cause of the injury was the unexpected and violent contact caused by the striking of the piston against the end of the cylinder. The failure of the hoist to stop automatically was the proximate cause. In this view, it is unnecessary to enumerate other and sufficient reasons for holding the plaintiff not necessarily negligent in the use of the rod grab.

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3. Defendant also assigns as error the charge of the court permitting the jury to consider the question of permanent injuries. This assignment of error is immediately related to another that the verdict is excessive and appears to have been given under the influence of prejudice and passion. These assignments will be considered together. Only one expert was called as a witness. He found the plaintiff with a fractured pelvis, unable to move his legs or turn over in bed. Plaintiff suffered a great deal from shock. His urine had to be catheterized. The physician was at one time apprehensive of his life. He thought there ought to be some improvement, but whether there would be entire recovery he was unable to say. At the end of more than a year the plaintiff was unable to do any manual labor. He could not cross his legs or stand upon them for any length of time. In view of this state of facts, we are of opinion that there was no reversible error in the charge, and that the verdict, which received the sanction of the trial court, is not so excessive as to justify us in setting it aside.

Affirmed.

On April 16, 1909, the following opinion was filed:

PER CURIAM.

The application for reargument by appellant herein is hereby denied.

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LEW M. LOWE v. WALTER G. BENZ.[1]

January 29, 1909.

Nos. 15,687—(53).

Action in the municipal court of Minneapolis to recover $50, the amount of a check drawn by plaintiff in favor of his brother and by his brother paid to defendant. The answer alleged a sale to plaintiff of an automobile for the price of $450, on which the sum of $50, represented by the check, had been paid. The case was tried before Charles L. Smith, J., who directed a verdict in favor of plaintiff for $51. From an order denying defendant's motion for a new trial, he appealed. Affirmed.

Chas. A. Dalby, for appellant.

Evans & Peterson, for respondent.

PER CURIAM.

This was an action to recover $50 paid on an automobile. Plaintiff had instructed his brother in writing to enter into a contract for its purchase, subject to plaintiff's approval, and not to bind plaintiff. The brother selected an automobile and paid $50. Subsequently plaintiff himself called at defendant's place of business, refused to take the automobile, and demanded his money back. The trial court ordered verdict for the plaintiff.

Defendant urges: "When plaintiff called and gave the dealer his reasons for not taking the car, and when plaintiff then knew that his brother, as his agent, had assumed to act for him, that plaintiff did not then either claim that his brother had no such authority to act, nor did he deny the authority by which the agent had pretended to act, nor did he in any manner disaffirm such authority, but told the dealer he wanted a larger car. * * * When a principal clothes his agent with some authority, and the agent transcends that authority, or assumes other authority, and the principal does not wish to be bound by it, some positive duty then devolves on the principal, and that is to repudiate, disavow, or disaffirm such assumed authority to act for him. Nothing like that is even shown in this case on plaintiff's part." The question of sufficiency of actual disaffirmance is purely one of fact. The record discloses enough uncontroverted testimony to sustain the court's order.

Affirmed.

[1] Reported in 119 N. W. 249.

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SOPHIE HEINZE v. JULIUS A. HEINZE.[1]

January 29, 1909.

Nos. 15,893—(135).

Appeal by defendant from an order of the district court for Ramsey county bearing date of June 13, 1908, Kelly, J., allowing temporary alimony and counsel fees to plaintiff. The facts are stated in the opinion. Reversed.

A. F. Storey and *Durment & Moore*, for appellant.

Otto Kueffner, for respondent.

PER CURIAM.

In an action for divorce, temporary alimony was allowed the plaintiff and respondent. On February 27, 1908, an order and decree was entered in favor of plaintiff, granting her a separation from bed and board, and requiring defendant and appellant to pay her during separation for her support the sum of $75 per month. A stay of forty days from said date was granted. After the expiration of this stay, on June 6, 1908, and before the judgment and decree was entered, the respondent again moved the court for an allowance as temporary alimony and counsel fees. Thereafter the court granted temporary alimony to the amount of $50 per month and counsel fees to the amount of $100, $50 of which was to be paid forthwith and balance when notice of appeal should be served upon respondent's attorney. Defendant appealed from that order. The result of these orders was that plaintiff obtained the right to compel defendant to pay her $75 per month as permanent alimony and for part of the same period an additional $50 per month as temporary alimony. The order did not provide that payment made under it should be credited on the permanent alimony to be provided for in decree to be entered. This was obviously improper, so far as allowance of alimony is concerned. The order is accordingly reversed. No statutory costs should be taxed.

[1] Reported in 119 N. W. 489.

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C. H. PHINNEY LAND COMPANY v. B. E. COREY.[1]

February 5, 1909.

Nos. 15,803—(104).

Action in the district court for Grant county to recover $640, and interest, on two promissory notes. The answer set up the facts stated in the opinion, and that prior to the tender of the abstract of title valuable timber had been cut and removed from the premises. The case was tried before Flaherty, J., who directed a verdict in favor of defendant. From an order granting plaintiff's motion to set aside the verdict and for a new trial, defendant appealed. Affirmed.

N. J. Bothne, for appellant.

F. W. Murphy and *E. J. Scofield*, for respondent.

PER CURIAM.

Plaintiff and respondent, a corporation, sold certain lands to the defendant and appellant for the sum of $1,920. The first of the payments of $320 each was evidenced by a promissory note. Action was brought thereon.

The defense was that plaintiff had failed to furnish an abstract as the contract required, whereby he was prejudiced and the contract ipso facto terminated. Under the contract, if the abstract failed to show a good marketable title to the land, or the deed was not made within a time named (November 15, 1903), the earnest money and the note should be forfeited. The contract was made September 22, 1903. Defendant says that no abstract was in fact furnished or attempted to be furnished until about the thirteenth or fourteenth day of December, 1903, a month after the first note became due and after "the deal was to be closed up," and that he then refused to accept the abstracts. (The abstracts showed that plaintiff had no title to the land until January 15, 1904.)

At the close of the evidence, the trial court directed a verdict for defendant. He subsequently granted a motion for a new trial, because he thought there should have been submitted to the jury the issue whether defendant had waived the furnishing of the abstract. The order of the trial court, while not entirely discretionary, involved his opinion that there was conflicting evidence, making it a question of fact for the jury. An examination of the record has satisfied us that there was sufficient testimony given by the defendant himself which, within the familiar rule on that subject, justified the order of the trial court. In this view it would be obviously improper to influence a new trial by consideration of other features of the case. Affirmed.

[1] Reported in 119 N. W. 1134.

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CHRISTIAN G. HAARSTAD v. MELVIN L. GATES.[1]

February 5, 1909.

Nos. 15,808—(163).

Action in the district court for Hennepin county to recover $800 for fraud. Defendant demurred to the complaint. From an order, Dickinson, J., overruling the demurrer, defendant appealed. Affirmed.

Mead & Robertson, for appellant.

A. H. Bright and *Fred W. Reed*, for respondent.

PER CURIAM.

The appeal is from an order overruling a general demurrer to the complaint.

It was alleged that the plaintiff, Haarstad, took one Peterson, who was afflicted with deforming rheumatism, to the so-called Gates Sanitarium, in the city of Minneapolis, and that the defendant, Gates, then examined Peterson and represented to the plaintiff that he (Gates) was a physician skilled and experienced in the treatment of persons suffering from diseases and physical infirmities, and was possessed of a certain secret power to cure diseases; that he was able to and could cure said Peterson of said deforming rheumatism; that said Peterson was afflicted with a curable disease, and that the defendant was possessed of the knowledge, skill, and power to cure said Peterson of said disease; that defendant employed a special form of treatment of said diseases, and that, if plaintiff would pay the defendant the sum of $500 and would pay the board of said Peterson and his attendant, defendant could and would cure said Peterson of said disease; that said representations and each of them were false; that defendant made such representations, knowing them to be false, and with the intent to deceive plaintiff and induce him to pay the money as hereinafter alleged; and that the plaintiff, believing such representations to be true, and relying thereon, was thereby induced to and did pay defendant, prior to January 1, 1908, the sum of $757; that by reason of the foregoing facts plaintiff has been damaged in the sum of $800.

The complaint is far from being a model, but it states a cause of action, and the trial court properly overruled the demurrer.

Order affirmed.

[1] Reported in 119 N. W. 390.

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ELIZABETH COLLINS v. LOUIS D. DE MARS.[1]

February 5, 1909.

Nos. 15,913—(185).

Action in the municipal court of Minneapolis to recover $118.74 as a commission for the sale of real estate. The case was tried before Charles L. Smith, J., and a jury, which returned a verdict in favor of plaintiff for $117.30. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, he appealed. Affirmed.

W. L. Hursh, for appellant.

John M. Rees, for respondent.

PER CURIAM.

The appellant, De Mars, being desirous of renting his house, left the key with the respondent, Collins, and told her that "if anybody comes along and talks about the place, and you send them to me, and they buy the place, I shall give you your commission." He also placed a "For Sale" sign in the window of the vacant house, with instructions thereon that the key could be obtained at Mrs. Collins' house number, next door. A Mr. Chapman saw the sign, got the key from Mrs. Collins, examined the house, and finally purchased it from the owner De Mars. Mrs. Collins testified that she gave Chapman the key and talked to him about the house. She had shown the premises to numerous other persons. Chapman told De Mars where he got the key. Mrs. Collins evidently rendered the services for which De Mars agreed to give her a commission, and under the circumstances he ought to have known that she would expect the promised commission.

The jury returned a verdict in favor of the plaintiff, and the defendant appealed from an order denying a motion for judgment notwithstanding the verdict or for a new trial. The case only involves questions of fact, and was properly disposed of by the jury.

Order affirmed.

[1] Reported in 119 N. W. 1134.

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SVERRE BIGUM v. ST. PAUL SASH, DOOR & LUMBER COMPANY.[1]

February 11, 1909.

Nos. 15,869—(192).

Action in the district court for Ramsey county to recover $10,000 damages for personal injuries sustained by plaintiff while operating a jointer machine in defendant's factory. The case was tried before Kelly, J., and a jury which returned a verdict in favor of plaintiff for $3,500. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Durment & Moore, for appellant.

Ludvig Arctander, for respondent.

PER CURIAM.

Respondent was injured while operating a jointer machine in appellant's factory. He was thirty eight years of age, a foreigner, had been in America five years, and was a cabinet maker by occupation. In another factory belonging to appellant he had from time to time operated a similar jointing machine, and for two months prior to the accident had occasionally operated the jointer in question in the new factory. He was an experienced cabinet maker, but not a machine operator, and his experience with jointing machines was incidental to his work as cabinet maker.

1. Respondent was injured while pushing a piece of molding about two feet long through the jointer. The board kicked back and broke, thus throwing his left hand into the knives. The evidence clearly indicates that it was practicable to guard the machine with what is known as an automatic or stationary guard. The machine was within the statute, and appellant was negligent in maintaining it without a guard.

2. It was established by the evidence that such machines had a tendency to kick back when small pieces of wood were passed through, especially if the knives were not in perfect shape, or if the wood was not accurately held. Respondent was directed by the foreman of the shop to plane off certain short pieces of wood, which were being used by him in the construction of some cabinet work. He knew the machine was not furnished with a guard, and, after using it awhile, discovered that one of the knives contained a nick, and noticed that the machine was not perfectly steady; but, owing to his limited experience, it cannot be said as a matter of law that he understood the danger and appreciated the risks of passing that kind of material through the machine.

[1] Reported in 119 N. W. 481.

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3. The evidence is sufficient to sustain the allegation that the knives were not in proper order, and that appellant was responsible for such condition. It was the duty of the master to furnish a reasonably safe instrumentality with which to do the work, and to see that the same was kept in proper condition. This was a continuing duty, and was not discharged by the exercise of due care in employing a person for that purpose. The person so employed was not a fellow servant of respondent. Lohman v. Swift & Co., 105 Minn. 148, 117 N. W. 418, and cases there cited.

4. That appellant was negligent in failing to properly instruct or warn respondent before putting him to work on the machine in its then condition is sustained by the evidence.

5. Although the complaint charges that appellant was guilty of failing to maintain an automatic guard, the evidence clearly shows that it was feasible to maintain either a stationary or automatic guard, and the court so instructed the jury. There was no substantial variance, and appellant was not misled by the instruction.

6. We find no merit in the thirteenth assignment of error, which challenges the statement of the court to the jury that the unsteady condition of the jointer might have been due to the construction of the building. There was no claim and no evidence that the building was improperly constructed, and, although the statement was inaccurate, there is nothing to indicate that the jury were misled.

The several questions of law were submitted to the jury by proper instructions, and there are no errors in any of the rulings.

Affirmed.

EDWARD C. OSBORN and Another v. PETER FROYSETH.[1]

February 26, 1909.

Nos. 15,849—(211).

Action in ejectment in the district court for Chippewa county by the assignees in trust of the Hastings & Dakota Railway Company against a person who had occupied since 1889 land within the indemnity limit claimed by that company under its land grant. The case was tried before Powers, J., who made findings and ordered judgment in favor of defendant. From an order denying their motion for a new trial, plaintiffs appealed. Affirmed.

Owen Morris and *Lyndon A. Smith*, for appellants.

C. A. Fosnes, for respondent.

[1] Reported in 119 N. W. 1135.

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PER CURIAM.

In Osborn v. Froyseth, 105 Minn. 16, 116 N. W. 1113, all the controversies involved in this appeal appear to have been determined adversely to plaintiff and appellant here, and in favor of defendant and respondent. We have examined the paper book and briefs in the case reported supra, and compared them with the paper book and briefs in the case at bar. Opportunity was given plaintiff to show cause why the decision in that case should not control the decision in the instant case. No such cause has been shown. The conclusion inevitably follows that the former decision determines the issues adversely to plaintiff. In this view, it would be superfluous to consider the additional points which the defendant presents. Affirmed.

STATE v. C. A. SMITH TIMBER COMPANY.[1]

March 12, 1909.

Nos. 15,766—(43).

Defendant was cited before the district court for Hennepin county to show cause why it should not pay $825.85, as taxes upon its personal property for the year 1906, and penalty. Defendant's answer alleged the assessment of $29,500 under item 17 was an arbitrary assessment in addition to the regular return of defendant under said item and a portion of the property returned by the defendant. The matter was tried before Brooks, J., who found in favor of the state for the amount claimed. Defendant's motion for a new trial was denied. From a judgment entered pursuant to the findings, defendant appealed. Affirmed.

Mead & Robertson, for appellant.

Edward T. Young, Attorney General, *Al. J. Smith*, County Attorney, and *W. C. Leary*, Assistant County Attorney, for the State.

PER CURIAM.

This is an appeal from a judgment entered in an action brought by the state against the C. A. Smith Timber Company for personal property taxes. The trial court found that the defendant, being required by the city assessor of the city of Minneapolis to list its property for taxation for the year 1906, made out and delivered to the assessor a list and schedule of personal property owned by it and in its possession or under its control on the first day of May, 1906, described as "logs, lumber, lath, and shingles in hands of manufacturers," of the value of $300,000. The assessor accepted the list so re-

[1] Reported in 119 N. W. 1135.

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turned, and entered in his assessment books, opposite the name of defendant, a description of the property so listed, and an assessment and valuation thereof as therein stated, and the same thereupon became the basis for a tax assessed and levied against the defendant, which has been by it fully paid and discharged. After the listing and assessing was made the assessor, upon a separate list prepared by him, arbitrarily listed for taxation for that year, as the property of the defendant and in its possession or control on the first day of May, 1906, certain property of the defendant, described as "logs, lumber, lath, and shingles in the hands of manufacturers," and arbitrarily valued and assessed the same at the value of $29,500. This arbitrary assessment was the basis for the tax sought to be enforced in the proceeding, which tax, with penalties thereon, amounted to $825.85. This arbitrary listing and assessment was made by a deputy city assessor by the direction of the city assessor, and so far as the evidence shows the city assessor directed such assessment in the belief that the previous listing and assessment was incomplete and inaccurate to the extent of such arbitrary assessment. The true and full value of all logs owned by the C. A. Smith Timber Company and in its possession or under its control on May 1, 1906, which were subject to assessment and taxation in the city of Minneapolis, was upwards of $765,000, or more than twice the aggregate sum at which the same were assessed in said year, and the said arbitrary assessment was in no sense illegal, erroneous, or unjust. Upon these findings the court ordered judgment for the state.

The defendant moved to amend the findings, so as to make it appear that the original value of $300,000 was fixed by the assessor, instead of by the defendant, in the list and schedule, and to find that the logs and lumber assessed at $29,500 were part of the property originally assessed as returned by the defendant and valued at $300,000. The court declined to change or amend the findings, and the original finding must stand, if sustained by the evidence. The appellant's contention is that the logs covered by the second or arbitrary assessment were included in the first assessment, and that the same property has been assessed twice, while the trial court held that the arbitrary assessment was made by the assessor in the belief that the previous listing and assessment was incomplete and inaccurate to the extent of the amount of the arbitrary assessment. It thus appears that appellant complains that the court has found against it on a question of fact, and that no principle of law is involved. We find no evidence in the record which would require the court to find that the arbitrary assessment was a duplication, or that it was other than as found by the trial court, and therefore affirm the judgment.

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AZELLA F. SMITH v. WILLIAM A. FUNK.[1]

March 26, 1909.

Nos. 15,825—(131).

Action in the district court for Blue Earth county to have a certain contract, deed, and redemption certificate declared to be a mortgage and that the same are usurious and void. The case was tried before Cray, J., who made findings and ordered judgment in favor of defendant. From the judgment entered pursuant to the order, plaintiff appealed. Reversed and new trial ordered.

Thomas and *Evan Hughes* and *C. J. Laurisch*, for appellant.

S. B. Wilson and *W. A. Funk*, for respondent.

PER CURIAM.

This is an appeal in an action brought by plaintiff and appellant against defendant and respondent to have a certain contract and deed and redemption certificate and assignment of mortgage declared to be a mortgage, and to have it decreed to be usurious and void, and for other relief. The plaintiff was a widow residing with her two daughters on the property in issue. The defendant was during the times herein involved, and is, a practicing attorney. After trial the court made findings of fact and conclusions of law which sustained defendant's view of the controversy. Judgment was entered according to his order. This appeal was taken from that judgment.

The merits of the controversy turn upon the relationship between defendant and plaintiff which existed at the time of the transactions. If the relationship was not that of attorney and client, the conclusions of the trial court should not be disturbed. If that relationship existed, the record, as it now exists, shows a failure by defendant to deal with that fairness and equity which the law required of him and an abuse of confidence. In such case the judgment should be opened, in order that a new trial might be had. The trial court made no express finding on that subject. Whether it regarded the fact of relationship as evidentiary only, or whether it regarded the controversy as immaterial, or whether it failed to find on the subject for some other reason, does not affirmatively appear. The conclusions which it reached should not be sustained on the presumption that the trial court found the necessary facts possibly inferable from the record, including the possible nonexistence of the relationship of attorney and client. So to do would be artificial and strained.

The evidence on this subject was conflicting. Direct and circumstantial evidence tended to show the relationship. The defendant strenuously denied

[1] Reported in 120 N. W. 1135.

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its existence. Under the circumstances the issue should be met fairly and squarely, and an express finding made. The circumstances of this case are such that to enter into a full statement or discussion of all the reasons which necessitate the ruling here made would necessarily tend to operate unfairly to defendant on the new trial. We have refrained from expressing any opinion whatever as to the merits of the questions of law and of fact to be litigated upon the new trial.

Reversed and new trial ordered.

LEWIS, J.

I concur in the result.

ELLIOTT and BROWN, JJ.

We concur in the conclusion that findings on the pivotal question in the case should have been in order.

JOHN McALPINE v. JOHN MILLEN.[1]

April 23, 1909.

Nos. 15,832—(19½).[2]

Appeal by plaintiff from an order of the district court for St. Louis county, Dibell, J., denying a new trial. Affirmed.

Ross & Dwyer and *J. N. Searles*, for plaintiff.

L. C. Harris and *H. B. Fryberger*, for respondent.

PER CURIAM.

After the disposition of this case on the former appeal (104 Minn. 289, 116 N. W. 583) the plaintiff made a motion for a new trial on the ground of newly discovered evidence. The motion was denied, and under the established rule (Bunker v. United Order of Foresters, 97 Minn. 361, 107 N. W. 392, and cases therein cited) we cannot, on this record, say that the court abused its discretion. Affirmed.

[1] Reported in 120 N. W. 1134.

[2] April, 1909, term calendar.

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JOSEPH MANTEL v. CROXTON MINING COMPANY.[1]

April 23, 1909.

Nos. 16,128—(61).

Action in the district court for St. Louis county by the administrator of the estate of Drago Sundic, deceased, to recover $5,000 for the death of his intestate caused by injuries sustained while working in defendant's open pit. From an order, Dibell, J., overruling defendant's demurrer to the complaint, it appealed. Affirmed.

Davis & Hollister, for appellant.

E. C. Kennedy, for respondent.

PER CURIAM.

This case comes here on appeal from an order of the trial court overruling the defendant's demurrer to the complaint. We have examined the complaint carefully, and considered the questions raised in the appellant's brief, and are satisfied that the demurrer was properly overruled. The order is therefore affirmed.

JOSEPH CORDELLO v. ANGELO DEPONTE.[2]

April 30, 1909.

Nos. 15,975—(3).

Action begun in justice court to recover $58. After judgment by default defendant appealed to the municipal court of St. Paul. The case was tried before Hanft, J., who ordered judgment in favor of plaintiff in the sum of $30. From an order denying defendant's motion for a new trial, he appealed. Affirmed.

Frederick L. McGhee, for appellant.

James Cormican, for respondent.

PER CURIAM.

Judgment was entered for plaintiff on default in the justice court, and appealed by defendant to the municipal court. Plaintiff moved in the municipal court for a dismissal of the appeal, and that the judgment of the justice court be affirmed, on the ground that no proof of service was indorsed on

[1] Reported in 120 N. W. 1134. [2] Reported in 120 N. W. 902.

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the notice of appeal. A continuance of the case was taken, an amended return was made, showing proof of service of the notice, and the motion to dismiss the appeal was denied. The case came on for final hearing, and on April 23, 1908, judgment was entered for plaintiff in the sum of $30, and the defendant appealed to this court from an order denying his motion for a new trial.

It would seem that the motion to dismiss the action in the municipal court was renewed in that court upon the further ground that the proof of service of the notice of appeal was not filed with the justice of the peace within ten days after the service of the notice. The facts appearing from the record justified the trial court in denying the motion to dismiss the appeal upon both grounds. The trial court was justified in allowing the complaint to be amended to conform with the evidence, and in finding that defendant was indebted to the plaintiff in the amount of the judgment. The point that the notice of appeal from the justice court was not served within ten days from the entry of judgment is raised in this court for the first time, and will not be considered.

Affirmed.

TOWN OF WINNEBAGO CITY v. FRITZ CHRISTENSEN.[1]

April 30, 1909.

Nos. 16,045—(48).

After the former appeal, reported in 102 Minn. 518, defendant moved for amended findings and for permission to file a supplemental answer. Both motions were refused, Quinn, J. From the judgment entered pursuant to the findings, defendant appealed. Affirmed.

Andrew O. Dunn, for appellant.

S. J. Abbott and *Putnam & Nicholsen*, for respondent.

PER CURIAM.

In this action the town of Winnebago City sought to enjoin the appellant from maintaining obstructions in a public highway. After a trial the court ordered a permanent injunction as prayed, and the order denying a new trial was affirmed by this court. Town of Winnebago City v. Christensen, 102 Minn. 518, 113 N. W. 1135. Thereafter the defendant applied to the district court for amended finding and for leave to file a supplemental answer. These motions were denied, and this appeal is from the judgment. We find no error in the record, and the judgment is affirmed.

[1] Reported in 120 N. W. 1135.

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NORTHWEST THRESHER COMPANY v. C. O. ANDERSON.[1]

April 30, 1909.

Nos. 16,144—(68).

Action in the district court for Blue Earth county to recover $515.25 upon two promissory notes. The defense of payment was interposed with a counterclaim for alleged overpayments. The case was tried before Olsen, J., and a jury which returned a verdict in favor of defendant. From an order denying plaintiff's motion for a new trial, it appealed. Affirmed.

H. N. Benson and *W. R. & C. D. Geddes*, for appellant.

Davis & Olsen, for respondent.

PER CURIAM.

The only question involved on this appeal is whether the evidence supports the verdict. The assignments of error challenging certain rulings of the court on the admission and exclusion of evidence are not argued or discussed in the briefs, and therefore not considered. Anderson v. International Harvester Co., 104 Minn. 49, 116 N. W. 101.

In reference to the question whether the evidence sustains the verdict, little need be said. The action was brought to recover upon certain promissory notes given by defendant to plaintiff, and the defense of payment was interposed, together with a counterclaim for alleged overpayments. The verdict was for defendant to the effect that the notes had been fully paid. A careful examination of the record leads to the conclusion that the evidence, though not in all respects clear, is not so palpably against the verdict as to justify a reversal. It would serve no useful purpose to discuss the evidence, and we refrain. The order denying a new trial is affirmed.

[1] Reported in 120 N. W. 1134.

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—Kinney v. Munch, 378.

ALIEN.

While great caution should be exercised in the examination of applicants for citizenship, yet no hard and fast rule can be laid down. Each case must depend largely upon its special facts. The practical test is whether the evidence, considered as a whole, justifies the conclusion that the applicant will make a good citizen. An applicant, otherwise entitled to citizenship, should not necessarily be denied the right because the evidence shows that he has no accurate knowledge of the federal constitution and form of government.

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APPEAL AND ERROR.

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Where a motion for judgment notwithstanding the verdict or for a new trial was not heard on the merits, and there was nothing in the record on which to base any assignment intended to raise the question of the sufficiency of the evidence to support the verdict, that question is not before this court on an appeal.

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APPEAL AND ERROR—Continued.

laid is a preliminary one for the trial judge, whose decision will not be reversed on appeal, unless it is manifestly against the weight of the evidence and to the injury of the appellant.

—Wehring v. Modern Woodmen of America, 27.

In an appeal from a verdict in condemnation proceedings it is *held* that certain objections, not covered by assignments of error and not argued in appellant's brief on appeal, are not properly presented for consideration.

—Ellering v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 46.

In condemnation proceedings plaintiff served notice of appeal immediately after the filing of the report of the commissioners to assess damages, and after the commissioners had served notice of the filing of the award, he took an appeal to the district court. *Held:* There was but one appeal. The notice of appeal given prior to the notice of filing the report was void.

—Ellering v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 47.

An assignment of error: "The court erred in denying appellant's motion for a new trial upon the several grounds alleged in the notice thereof" is insufficient in itself.

—Ellering v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 47.

In an action for damage to a carload of fruit while in transit to Chicago, where the car was diverted to another consignee at Des Moines and then, after refusal of the second consignee to receive it, a subsequent order was given to forward the car to Chicago, the case was tried on the theory of a continuous shipment from California to Chicago. *Held:* Defendant on appeal cannot for the first time be heard to assert there was an independent contract to forward the car from Des Moines to Chicago.

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The refusal of the court to make findings of fact, where the sole question on appeal from the probate court was whether the appellant was incompetent to have charge of his property and affairs, was not prejudicial in this particular case.

—Swick v. Sheridan, 130.

Where issues of fact are tried by the court without a jury, the admission of incompetent or immaterial evidence is not reversible error, if the competent and relevant evidence is sufficient to support the findings of fact, and there is no reasonable ground for inferring

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APPEAL AND ERROR—Continued.

from the nature of the improper evidence that it was or might have been a material factor in the court's determination of the facts.

—American Bridge Co. of New York v. American District Steam Co., 140.

It was not reversible error, in an action to recover for loss of services, to allow the plaintiff to answer the question: "To what extent do you think his ability to perform manual labor has been impaired"? when there was undisputed competent evidence that the boy was and would be during his minority practically unable to do manual labor.

—Bailey v. Grand Forks Lumber Co., 209.

Where a motion for new trial is made solely on the ground of newly-discovered evidence and is denied by the court, the supreme court will not disturb the ruling, except where there was a clear abuse of discretion.

—Ewing v. Stickney, 220.

In an action for wrongful death there was no reversible error in the charge to the jury by the trial court, or in its refusal to grant a new trial because of misconduct of counsel in referring to defendant's failure to produce its engineer and fireman to prove that the bell had been rung.

—Hawkins v. Great Northern Railway Co., 245.

Where a requested instruction is not given but the charge, as given to the jury, expressed the same idea in different words, there was no prejudicial error on the part of the court.

—Pfudl v. F. J. Romer Sons, 356.

Held, following Kipp v. Clinger, 97 Minn. 135, that a memorandum, not made a part of an order granting a new trial which in itself is clear and positive, may not be referred to for the purpose of impeaching the order or overcoming the effect thereof.

—Alton v. Chicago, Milwaukee & St. Paul Railway Co., 457.

Objections to assignments of error as to the adequacy of findings of fact and the sufficiency of the evidence to support them, were overruled in an appeal where the testimony was not returned and the appeal was decided on the merits.

—Calderwood v. Jos. Schlitz Brewing Co., 465.

Admissions of a person, since deceased, tending to establish a controverted fact in litigation, are scrutinized closely, and their weight and effect as substantive evidence are for the trial court. In this case the findings are not clearly against the evidence.

—Powers v. Johnson, 476.

Where the only argument in respect to certain errors was: "The court should have sustained our objections to the evidence which plaintiff

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APPEAL AND ERROR—Continued.

offered tending to show the character of the business conducted by the defendants as to renting out rooms, etc. We therefore submit that assignments of error numbers 1, 2, 4, 11, 12, 13, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31 and 32 ought to be sustained", the case falls within the rule that assignments of error not urged in the brief are waived.

—Wickstrom v. Swanson, 482.

In proceedings to compel a trial judge to sign and certify a "case" as one containing all the evidence offered or received upon the trial, or pertinent to specific questions sought to be raised, the burden is upon the moving party to satisfy this court that his proposed case in fact contains all the evidence.

—State ex rel. v. Quinn, 503.

It is not the duty of the trial judge affirmatively to point out wherein the case is incomplete. His certificate that it does not conform to the truth is final, unless overcome by competent proof.

—State ex rel. v. Quinn, 503.

An order of the trial judge denying a motion to amend a proposed case, after the time limited for the service thereof, or to extend the time and permit a new case to be proposed, is not reviewable in mandamus proceedings to compel an allowance and settlement of the case.

—State ex rel. v. Quinn, 503.

The state has a right of appeal from a judgment in favor of defendants in a proceeding by it against a corporation and the officers for violation of the anti-trust statute.

—State v. Duluth Board of Trade, 507.

On appeal from a judgment of the district court affirming a judgment from the municipal court, an objection that notice of appeal from the municipal court was not served in due time cannot be considered when first raised on appeal.

—Cordello v. Deponte, 573.

In an action on promissory notes where the defense was payment, the evidence was not so palpably against the verdict in favor of defendant as to justify reversal.

—Northwest Thresher Co. v. Anderson, 575.

The court's attention not having been called to an inaccurate phrase used in the charge respecting the duty of the employer to furnish a safe place until the jury had retired, the use of the phrase was not reversible error.

—Waligora v. St. Paul Foundry Co., 554.

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ATTORNEY GENERAL.

R. L. 1905, § 143, was not intended to limit the general powers of the attorney general as the chief law officer of the state.

—State v. Crombie, 170.

AUCTION AND AUCTIONEER.

An announcement or advertisement that certain property will be sold at auction to the highest bidder is a mere declaration of intention to hold an auction at which bids will be received. It is not an offer to sell, which becomes binding, even conditionally, on the owner when a bid is made.

—Anderson v. Wisconsin Central Railway Co., 296.

An auctioneer asks for bids for the property, and a bid is an offer to purchase at the price named. Until the offer is accepted, no contract relations exist. At any time before the bid is accepted, the bidder may withdraw his offer to purchase or the owner his offer to sell.

—Anderson v. Wisconsin Central Railway Co., 296.

BANK AND BANKING.

The plaintiffs forwarded to their agent a check to be used in paying their debt to a customer. The agent forged the name of the payee, and deposited the check in a bank to his own credit. Being short in his account with his principals, the agent then paid to them a sum of money which included the proceeds of the forged check. The bank on which the check was drawn paid it on the forged indorsement. In an action by the drawers of the check against the bank, *held*, that inasmuch as the proceeds of the check came back to the drawers, and the debt of the agent remained unpaid, they had suffered no damage by reason of the payment of the check, and could not recover the amount thereof from the bank.

—Andrews v. Northwestern National Bank, 196.

BANKRUPTCY.

A saloonkeeper sold his business, and the transfer of the license to sell liquor to the purchaser was approved by the city council. A brewing company had advanced the saloonkeeper the money to pay for the license, and when the purchaser paid the money for the license the money was deposited in bank to the credit of the brewing company, and the certificate of deposit was held by a third person. In an action by the trustee in bankruptcy of the saloonkeeper to obtain the money paid to the stakeholder, it was *held* that plaintiff was not entitled to the money.

—Sharp v. Simonitsch, 133.

BENEFICIAL ASSOCIATION.

Under the statute as it stood before the Revision of 1905, where the constitution of a benevolent association names the persons from whom

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BENEFICIAL ASSOCIATION—Continued.

a member may select a beneficiary to receive an insurance fund, and provides that any beneficial certificate issued to any other person shall be null and void, but reserves the right to the member to change the beneficiary already named and dispose of the proceeds of the certificate by a will, a designation of any person not within any of the classes named is null and void, unless it is made by will.

—Middelstadt v. Grand Lodge of Order of Sons of Hermann, 228.

BROKER.

In an action to recover commissions alleged to have been earned by the production of a purchaser for certain real estate, it appeared that the owner gave the proposed purchaser an option to purchase the land if the holder of a prior existing option failed to avail himself of his privilege to purchase. The sale was made to a party not named in the first option, but who claimed an interest therein and the right to purchase under it. *Held*, that the finding of the jury that the party to whom the sale was made was not entitled to purchase under the option is not sustained by the evidence.

—Frye v. Wakefield, 291.

Where an action for recovery of a commission for procuring a customer to buy defendant's dwelling involved only questions of fact, the verdict was sustained by the evidence and defendant was not entitled to judgment notwithstanding the verdict.

—Collins v. de Mars, 566.

CARRIER.

A carload of vinegar was shipped under a bill of lading issued by the Union Pacific Railway Company to plaintiff at Tenny, Minnesota. By mistake of the connecting carrier it was delivered to defendant, which carried it to Tenney in Wilkin County, when it was intended for Tenny in Clay County, a station on the Northern Pacific Railway. Upon request defendant carried it to Glenwood and placed it on the transfer track to the Northern Pacific Railway, which declined to become responsible for the freight earned by defendant until the amount had been paid by plaintiff. In an action to recover for delay in carrying the car from Tenney to Glenwood, where the defense was that the shipment from Tenney to Glenwood was not an original shipment but under the bill of lading, the terms of which had been violated by plaintiff, it was error to submit the case to the jury on the evidence and not on the pleadings, the evidence having been that used in another case against the Northern Pacific Railway upon other pleadings.

—Bick v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 78.

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CARRIER—Continued.

A carload of fruit was shipped from California to Chicago, but diverted to Des Moines, where it was held two days and then refused by the consignee, then transported to Chicago. The evidence tended to show the lemons were in good condition when shipped and in bad condition when received in Chicago. By the charge to the jury defendant was relieved from liability for what may have occurred between the time of inspection by the consignee at Des Moines and the time of receiving the order to forward the car to Chicago. On appeal the defendant cannot for the first time assert the burden of proving the condition of the lemons at Des Moines was on the plaintiff.

—Laverne Citrus Association v. Chicago Great Western Railway Co., 94.

Contract to transport fruit from Washington to Minnesota by the terms of which defendant did not undertake to carry the property by any particular train but agreed to forward the shipment with reasonable dispatch. In an action for damages because the fruit was delivered after ten days, where it was stipulated the schedule of the train was seven days and there was no evidence that the train had ever made the schedule time, it was *held* the court did not err in directing a verdict for the defendant.

—Gamble-Robinson Commission Co. v. Northern Pacific Railway Co., 187.

A railroad as a common carrier is required to exercise the highest degree of care, skill, and foresight for the safety of passengers consistent with the practical operation of its road.

—Campbell v. Duluth & Northeastern Railroad Co., 358.

The standard of care has due regard to the circumstances; that is to say, "in reference to every particular the highest degree of care which can be exercised in that particular, with a reasonable regard to the nature of the undertaking and the requirement of the business in all other respects," must be exercised.

—Campbell v. Duluth & Northeastern Railroad Co., 358.

A common carrier of passengers on a freight or mixed train is required to exercise the highest degree of care consistent with the practical operation of such a train.

—Campbell v. Duluth & Northeastern Railroad Co., 358.

A carrier having limited fitness and capacity to transport passengers, and whose primary business is to transport its logs, is not held to the standard of perfection of an ideal road, but must exercise the highest degree of care practicable under the circumstances.

—Campbell v. Duluth & Northeastern Railroad Co., 358.

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CARRIER—Continued.

Evidence of care customary among well constructed and operated roads of the same class is admissible to show diligence, in an action brought by a passenger injured while riding in a freight train of a logging road. —Campbell v. Duluth & Northeastern Railroad Co., 358.

In this case it is *held* that whether defendant was a general commercial railroad or a logging road was a question of fact for the jury. —Campbell v. Duluth & Northeastern Railroad Co., 358.

CASES DISTINGUISHED.

Ames v. Waterloo, 120 Iowa, 645.
—Bremer v. St. Paul City Railway Co., 336.

Atlas v. National Biscuit Co., 100 Minn. 30.
—Manore v. Kilgore-Peteler Co., 350.

Christianson v. Northwestern Compo-Board Co., 83 Minn. 25.
—Bean v. Keller Manufacturing Co., 165.

City of Jordan v. Nicolin, 84 Minn. 370.
—State v. Collins, 501.

Coles v. Trecothick, 9 Ves. 234.
—Stromme v. Rieck, 182.

Creamer v. West End, 156 Mass. 324.
—Bremer v. St. Paul City Railway Co., 336.

De Greif v. Northwestern Knitting Co., 106 Minn. 15.
—Manore v. Kilgore-Peteler Co., 350.

Downs v. St. Paul City Ry. Co., 75 Minn. 41.
—Bremer v. St. Paul City Railway Co., 336.

Doyle v. Albany, 39 N. Y. Supp. 440.
—Bremer v. St. Paul City Railway Co., 337.

Fitzgerald v. St. Paul, M. & M. Ry. Co., 29 Minn. 336.
—Bailey v. Grand Forks Lumber Co., 209.

Gray v. Fort, 198 Pa. St. 184.
—Bremer v. St. Paul City Railway Co., 337.

Hetland v. Board of County Commrs. of Norman County, 89 Minn. 492.
—Calderwood v. Jos. Schlitz Brewing Co., 470.

Leslie v. Lorillard, 110 N. Y. 519.
—Shaw v. Staight, 161.

Liljengren Furniture & Lumber Co. v. Mead, 42 Minn. 420.
—American Bridge Co. of New York v. American District Steam Co., 145.

McGreevy v. New York, 98 N. Y. Supp. 1024.
—Bremer v. St. Paul City Railway Co., 337.

McKinney v. Bode, 32 Minn. 228.
—Holland v. Netterberg, 382.

Metz v. St. Paul City Ry. Co., 88 Minn. 48.
—Bremer v. St. Paul City Railway Co., 336.

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CASES DISTINGUISHED—Continued.
Morice v. Milwaukee, 129 Wis. 529.
—Bremer v. St. Paul City Railway Co., 336.
Murphy v. Great Northern Ry. Co., 68 Minn. 526.
—Pintar v. Pitt Iron Mining Co., 259.
O'Brien v. St. Paul City Ry. Co., 98 Minn. 205.
—Bremer v. St. Paul City Railway Co., 336.
Pittsburg Ry. Co. v. Cluff, 149 Fed. 732.
—Bremer v. St. Paul City Railway Co., 336.
Robertson v. Burton, 88 Minn. 151.
—Bailey v. Grand Forks Lumber Co., 196.
St. Paul Gaslight Co. v. Village of Sandstone, 73 Minn. 225.
—State ex rel. v. Village of Gilbert, 370.
Scott v. University, 152 Mich. 684.
—George v. University of Minnesota Athletic Association, 427.
State v. Barge, 82 Minn. 256.
—State v. Brown, 176.
State v. Justus, 90 Minn. 474.
—Calderwood v. Jos. Schlitz Brewing Co., 470.
State v. McGregor, 88 Minn. 74.
—State v. Brown, 176.
State v. Northern Pacific Ry. Co., 95 Minn. 43.
—State v. Nelson, 322.
State v. Quinlan, 40 Minn. 55.
—State v. Collins, 502.
State v. Ritt, 76 Minn. 531.
—Calderwood v. Jos. Schlitz Brewing Co., 470.
State v. Village of Harris, 102 Minn. 340.
—State ex rel. v. Village of Gilbert, 370.
State v. Wilson, 73 Kan. 334.
—State v. Duluth Board of Trade, 553.
Suter v. Page, 64 Minn. 444.
—Bernick v. McClure, 10.
Terien v. St. Paul City Ry. Co., 70 Minn. 532.
—Bremer v. St. Paul City Railway Co., 336.
Thomas v. City of St. Cloud, 90 Minn. 477.
—Calderwood v. Jos. Schlitz Brewing Co., 470.
Thompson v. Buffalo, 145 N. Y. 196.
—Bremer v. St. Paul City Railway Co., 336, 337.
Welford v. Beazely, 3 Atk. 503.
—Stromme v. Rieck, 182.

CASE LIMITED.
State v. Dahl, 69 Minn. 108.
—State ex rel. v. Olson, 136.

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CERTIORARI.

A writ of certiorari should run in the name of the state, and must be directed to the court or body whose proceedings are sought to be reversed.

—State ex rel. v. Village Council of Blackduck, 441.

When it is sought to review the action of a village council in canceling a liquor license, the writ must be directed to the village council, and not to the president and recorder of the village.

—State ex rel. v. Village Council of Blackduck, 441.

COLLEGE AND UNIVERSITY.

The University of Minnesota Athletic Association is a branch or department of the University of Minnesota, and is not a proper party defendant in an action of tort brought by a spectator injured by the collapse of the platform.

—George v. University of Minnesota Athletic Association, 424.

COMPROMISE AND SETTLEMENT.

Two brothers were partners in acquiring and disposing of mining properties and the plaintiff sent various sums of money to his brother to be invested for him. After the termination of the partnership and in settlement of the indebtedness to the plaintiff, as partner and as trustee, upon the false representation that the debtor was unable to pay more, a written settlement and release of all obligations was executed by both brothers in consideration of part payment. Fifteen years later upon the death of his brother, plaintiff learned that the decedent was financially able to pay his indebtedness. In an action to set aside the settlement and for an accounting, it was *held* that the action would lie; that the mere lapse of time without inquiry into the trusteeship does not of itself constitute such laches as to preclude recovery; and the statute of limitations would not begin to run until the discovery of the fraud.

—Johnston v. Johnston, 109.

CONSTITUTION.

Section 2316, R. L. 1905, as amended by Laws 1907, p. 128, c. 117, § 3, relating to the registration of licensed dentists, does not delegate either legislative or judical powers to the board of dental examiners, and it is constitutional.

—State v. Crombie, 166.

Section 2315, R. L. 1905, as amended by Laws 1907, p. 128, c. 117, § 2, relating to what persons shall be said to be practicing dentistry, does not violate the provision of either the state or federal constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law.

—State v. Crombie, 171.

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CONTRACT.

Action to recover the balance due upon a contract for the erection by the plaintiff of the structural steel in the defendant's power house, and for extras. The answer admitted the contract, and alleged as a counterclaim damages sustained by the defendant by the delay of the plaintiff in performing the contract. *Held:* The evidence sustained the findings of fact of the trial court, and no reversible errors were made in ruling upon the admission of evidence.

—American Bridge Co. of New York v. American District Steam Co., 140.

Where a written contract is silent as to the time for performance, the law implies that it must be performed within a reasonable time, and parol evidence is not admissible to vary the construction of the contract so implied by showing an understanding of the parties as to what would be a reasonable time. Such evidence of facts known to the parties at the time of execution and pleaded is admissible upon an issue of what was a reasonable time, and also on the question as to what damages were reasonably within the contemplation of the parties.

—American Bridge Co. of New York v. American District Steam Co., 140.

A substantial failure of consideration of a contract may justify its rescission. A failure to make a loan to defendants, as agreed to by plaintiff's agent, at the time the note was given, is such a failure.

—Julius Kessler & Co. v. Parelius, 224.

Where a written contract between an engineer and an elevator company specified that for his services in furnishing plans and specifications, the plaintiff was to receive seven per cent. on a certain sum, and he should not be held responsible for delays however caused, but if he failed to have the elevator completed for the reception of grain on the date named, he should receive only six per cent., the contract was construed to limit plaintiff's compensation to six per cent.

—Irwin v. Gould Elevator Co., 233.

CORPORATION.

Shares of stock in a corporation issued and sold as full paid stock, but for a sum less than its par value, are not void, but the agreement between the holder and the corporation that it shall be considered and treated as paid in full is voidable as to the creditors of the corporation.

—Shaw v. Staight, 152.

The holder of such stock, though he paid therefor less than the par value, may maintain an action to protect such rights as accrue to him as a stockholder.

—Shaw v. Staight, 152.

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CORPORATION—Continued.

A request to the managing officers of a corporation to institute an action to set aside and cancel a fraudulent issue of corporate stock, and their refusal, is all that is necessary to enable an individual stockholder to maintain the suit. It is not necessary to go further and request other stockholders to commence the action.

—Shaw v. Staight, 152.

Evidence *held* to justify the findings of the trial court to the effect that an issue of twenty-eight thousand shares of the stock of defendant corporation was fraudulent and void, and that defendant Staight, the holder of a part of the stock so issued, had full knowledge of the facts constituting the fraud, and was not a good-faith holder thereof.

—Shaw v. Staight, 152.

A transaction fraudulent as to the stockholders is incapable of ratification by the corporation without their acquiescence and consent.

—Shaw v. Staight, 161.

COUNTY AND COUNTY OFFICERS.

A board of county commissioners was composed of five members, each representing a district within the county. A representative of one district had failed to qualify. No steps had been taken to fill the vacancy thus arising. The power of filling such a vacancy was not vested in the board. It is *held* that four members may exercise the legislative powers of that board.

—Swedback v. Olson, 420.

Held, construing R. L. 1905, § 620, that when a board of county commissioners has once deliberately acted upon a claim against a county and definitely allowed or disallowed it, so that the time for appeal therefrom has begun to run, it cannot thereafter, at least in the absence of fraud or mistake and notice of hearing, set aside its decision and take some other action thereon.

—State ex rel. v. Peter, 460.

COURTS (DISTRICT).

Where an appeal from probate court involves the trial of issues of fact, the trial court should make findings of fact and conclusions of law as in ordinary civil actions.

—Swick v. Sheridan, 130.

CRIMINAL LAW.

Where defendant was designated "Charlet E. Crombie" in the complaint and warrant when his name was Charles E. Crombie, the trial court rightly refused the prisoner's motion to be discharged on

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CRIMINAL LAW—Continued.

account of the misnomer. There was no question as to the identity of defendant.

—State v. Crombie, 169.

Where a prosecution for violation of the act regulating the practice of dentistry was conducted by the attorney of the Board of Dental Examiners by the express authority of the attorney general and the request of the city attorney, a motion to dismiss the case because it was not prosecuted by the city attorney, as provided by R. L. 1905, § 143, was properly denied.

—State v. Crombie, 170.

If the defendant in a prosecution for practicing dentistry without a certificate of registration as a licensed dentist was in fact a student, and within the exceptions of the statute relating to students, the burden was on him to prove the fact.

—State v. Crombie, 171.

DAMAGES.

When damages are sought to be recovered for injuries to the nervous system, alleged to have been caused by actionable negligence, the utmost circumspection must be exercised to avoid the injustice which is likely to result from the denial of substantial compensation for real injuries and in the award of damage in cases of honest mistake or of cunning fraud. A new trial granted because the jury awarded $4,060 to plaintiff.

—Johnson v. Great Northern Railway Co., 285.

A verdict of $6,000 in a personal injury action where the injuries were concededly permanent, which the trial court refused to set aside, was not so excessive as to show that the jury was influenced by passion and prejudice.

—Olson v. Pike, 411.

A verdict of $5,000 *held* not excessive, where a man of forty years of age had a fractured pelvis, and at the end of more than a year was unable to do any manual labor, and could not stand on his legs for any length of time.

—Waligora v. St. Paul Foundry Co., 561.

DEDICATION.

Evidence tending to show that the public authorities recognized the land in question as a public highway, and treated it as such by making improvements at public expense, *held* to sustain the finding of the trial court that there was a public highway in front of the plaintiff's property by a common-law dedication, and that the defendant had constructed its tracks thereon without authority.

—Hruska v. Minneapolis & St. Louis Railroad Co., 98.

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DEED.

A clause in a contract for the exchange of real estate, which included the giving of a "quitclaim deed to a lot adjoining lots in Ways addition", was not so indefinite and uncertain as to render the whole contract a nullity. The contract was subject to explanation and the lot identified by extrinsic evidence. A tender of a quitclaim deed from the holder of a tax title was a sufficient compliance with the agreement.

—Stromme v. Rieck, 183.

DENTIST.

See Physician and Surgeon.

DEPOSITARY.

Action to recover money delivered to the defendants by the plaintiff, safely to be kept and returned on demand. Verdict for the plaintiff. *Held*, the evidence is sufficient to sustain the verdict against both defendants.

—Wickstrom v. Swanson, 482.

The trial court did not err in its charge to the jury, nor in refusing to give requested instructions.

—Wickstrom v. Swanson, 482.

DIVORCE.

Under a complaint for an absolute divorce on the ground of cruel and inhuman treatment, a court may grant a limited divorce. Wagner v. Wagner, 36 Minn. 239, followed and applied.

—Heinze v. Heinze, 43.

A finding that the conduct of a husband to his wife was "improper" does not conform to the requirements of the second subdivision of section 3598, R. L. 1905.

—Heinze v. Heinze, 43.

Findings that allegations of a complaint were true, except as to personal assaults and refusal to furnish medical aid, *held* to have been insufficient to sustain an order granting a limited decree, because the allegations as to such assaults and medical aid were so interwoven with other allegations of cruel and inhuman treatment, and the evidence pertinent to each so interrelated, that on the exclusion of assaults and medical aid not enough remained to make out a case of cruel and inhuman treatment.

—Heinze v. Heinze, 43.

The defendant was convicted of nonsupport of his wife. His defense was that she was not his legal wife, because her divorce from her former husband, who is still living, was void for the reason that service of the summons was by publication, and the judgment roll

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DIVORCE—Continued.

does not show that personal service could not well have been made. *Held*, that the divorce was valid.

—State v. Doyle, 498.

Where plaintiff was granted a separation from bed and board, and defendant was ordered to pay her during separation for her support the sum of $75 per month, it was improper, after the expiration of the stay granted and before entry of the judgment, upon plaintiff's motion for temporary alimony and counsel fees, to grant her temporary alimony of $50 per month and counsel fees of $100, without providing that payments under the order should be credited on the permanent alimony.

—Heinze v. Heinze, 563.

DOWER.

The signature of the wife as a witness to an executory contract by the husband for the sale of his real estate, she being in no way referred to in the body of the contract as a party thereto, does not constitute on her part a written consent to the sale within the meaning of section 3648, R. L. 1905.

—Stromme v. Rieck, 177.

The evidence was insufficient to show a parol contract for the sale of the land by the wife.

—Stromme v. Rieck, 177.

The widow's third in land owned by her husband, though in lieu of the former dower right, is for all substantial purposes identical with that right and is protected by an application of the same rules and principles of law.

—Stromme v. Rieck, 181.

DRAIN.

The order required by section 10, c. 230, p. 315, Laws 1905, establishing a ditch, must in itself, or by reference to the engineer's report, which is itself sufficient, definitely locate the ditch, by giving the proper starting point, route, and terminus. The order under consideration in this case *held* insufficient.

—Johnson v. County of Morrison, 87.

Under Laws 1905, p. 303, c. 230, a petition for a ditch in proper form, filed as required by the statute, is a jurisdictional prerequisite to the authority of the county commissioners to entertain a proceeding thereunder. But the description of the proposed ditch need not be stated with perfect accuracy. If the starting point, route and terminous are stated with approximate accuracy, it is sufficient for jurisdictional purposes. The notice of hearing before the commissioners is also jurisdictional.

—Johnson v. County of Morrison, 87.

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EJECTMENT.

The legal title to real property carries with it the right of possession, which is sufficient, under section 4073, R. L. 1905, to authorize an action to recover the same from one in possession thereof without right or title.

—Norton v. Frederick, 36.

A purchaser from the state of school lands which have been submerged by the maintenance of a dam across a stream may maintain an action for the possession thereof, and the parties maintaining the dam are not entitled to set up as a defense the right of a village, located upon the flowage, to prevent the dam from being abated.

—Kinney v. Munch, 378.

ELECTION.

The provision of the statute (R. L. 1905, § 336) as to the filing of the notice of an appeal in an election contest and the service thereof on the contestee is mandatory, and unless the notice is both filed and served within ten days after the canvass is completed no jurisdiction to hear the contest is acquired by the court.

—Odegard v. Lemire, 315.

Rule that where two statutes on the same subject are inconsistent, the court will give effect to the later of the two, applied to sections 336 and 343, R. L. 1905, and the former *held* to extend the right of contest to village elections; the provisions of that section being the latest expression of the legislature on the subject.

—State ex rel. v. District Court of Hennepin County, 437.

The poll list, a record of the names of voters made by election officers during the progress of the election as they appear and cast their ballots, is, in the absence of clear proof to the contrary, conclusive of the names and number of persons who voted.

—Lannon v. Ring, 453.

A ballot found in the ballot box by referees appointed in contest proceedings to recount the ballots cast at a particular precinct, which was not attached to the string of ballots counted by the officers of the election, and which, if counted, exceeded the number of ballots cast as shown by the poll list, was *held*, in view of the facts stated in the opinion, not sufficiently identified as a lawfully cast ballot.

—Lannon v. Ring, 453.

A voter appeared to have properly marked his ballot for contestant, and then attempted to obliterate the same by means of other pencil marks or scratches, concluding his efforts by placing a proper mark after the name of contestee. *Held* properly counted for contestee, under subdivision 8, § 302, R. L. 1905.

—Lannon v. Ring, 453.

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ELECTION—Continued.

Similar marks and erasures opposite the names of other candidates *held* not marks of identification.

—Lannon v. Ring, 453.

EMINENT DOMAIN.

Under R. L. 1905, § 2532, an appeal from the award or report of commissioners to the district court may be made within thirty days after service of the notice that the report has been filed. A notice of appeal given prior to service of such notice was of no legal validity. A notice of appeal after such service perfected the appeal.

—Ellering v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 46.

The trial court did not abuse its discretion in allowing plaintiff to open and close to the jury. Minnesota Valley Ry. Co. v. Doran, 17 Minn. 162 (188), followed.

—Ellering v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 46.

Alleged erroneous ruling on evidence did not result in prejudicial error.

—Ellering v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 46.

Where both parties assumed throughout the trial that plaintiff's land constituted one farm, the trial court did not err in assuming this to be a fact and in not submitting to the jury whether the tract of land was used as one farm and constituted but one tract.

—Ellering v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 48.

Where the trial court charged the jury that the damages recoverable by the landowner was the difference between the value of the farm taken as a whole before the building of the railway across the same and its value as a farm with the railway located upon the same as it now exists, and the attention of the court was not called to the ambiguity as to time and no exception was taken, the matter is controlled by the rule in Steinbauer v. Stone, 85 Minn. 274.

—Ellering v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 48.

EVIDENCE.

In an action of replevin evidence as to the name of the record owner of land upon which the personal property sued for was kept, and in whose name it was assessed, had no direct tendency to prove title to the chattels, but it was not improper to receive the evidence upon the question of the location and possession of the personal property.

—Bernick v. McClure, 11.

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EVIDENCE—Continued.

The degree of proof required to lay the foundation for secondary or parol evidence of the contents of a written instrument depends upon the circumstances of each particular case, such as the character of the instrument, its relation to the issue, and whether the original is within or without the jurisdiction of the court. Where the instrument is the foundation of the action or defense, stricter proof should be required than in a case where the existence and contents of a writing are only incidentally or collaterally involved.

—Wehring v. Modern Woodmen of America, 28.

The foregoing rule applied in the case of a notice of the disappearance of plaintiff's husband, with a request for information from any one knowing of his whereabouts, which was prepared by the witness at the request of plaintiff, sent to and published in the official newspaper of defendant, and then read but not kept by the witness.

—Wehring v. Modern Woodmen of America, 28.

The statute making it incompetent for a party to an action, or any person interested in the event thereof, to give evidence concerning a conversation or admission of a deceased or insane person relative to any matter at issue therein, R. L. 1905, § 4663, cannot be evaded by indirection.

—Peters v. Schultz, 32.

Rulings of the court in excluding certain nonexpert opinion evidence relative to the mental condition of appellant *held* not reversible error.

—Swick v. Sheridan, 130.

Where a written contract is silent as to the time for performance, the law implies that it must be performed within a reasonable time, and parol evidence is not admissible to vary the construction of the contract so implied by showing an understanding of the parties at the time it was made as to what would be a reasonable time.

—American Bridge Co. of New York v. American District Steam Co., 140.

Parol evidence, however, of facts known to the parties at the time the contract was made, which are pleaded, is competent and relevant upon the trial of an issue of what, in view of all the circumstances, was a reasonable time for performance, and also on the trial of the question as to what damages were reasonably within the contemplation of the parties.

—American Bridge Co. of New York v. American District Steam Co., 140.

In an action to recover on a promissory note, parol evidence was admissible to show that the parties had previously made an oral agree-

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EVIDENCE—Continued.

ment for the purchase of a commodity in pursuance of which the note was given, that under such agreement the payee of the note was to make its maker a certain loan, and that the loan had not been in fact made. Wheaton Roller Mill Co. v. Noye Mnfg. Co., 66 Minn. 156, followed and applied.

—Julius Kessler & Co. v. Parelius, 224.

In such case it was not error to admit evidence of a conversation prior to the date of the oral agreement. Such evidence was competent corroboration to show the negotiation preceding the oral agreement.

—Julius Kessler & Co. v. Parelius, 224.

Action by the executrix of the will of a deceased partner against the surviving partner for an accounting as to the partnership property. Defense, that all the assets of the firm were sold to the defendant in the lifetime of the deceased partner. Judgment for the defendant. *Held*, a written agreement, given in part performance of an oral one, which included the subject-matter of the written one and other matters not intended to be embraced in the written one, will not exclude parol evidence of the oral agreement in respect to such other matters.

—Rines v. Ferrell, 251.

Questions calling for the opinion of an expert witness must be based upon facts testified to by him, or facts testified to by others, or upon an agreed state of facts, or facts assumed hypothetically as true.

—Webb v. Minneapolis Street Railway Co., 282.

The value to be attached to the testimony of physicians concerning alleged nervous disorders is to be determined, inter alia, by the extent and character of the examination actually made by the testifying physicians, generally as to plaintiff's physiological condition, and especially as to the condition of his nervous system.

—Johnson v. Great Northern Railway Co., 285.

Admissions of a person, since deceased, tending to establish a controverted fact in litigation, though uncontradicted, are not necessarily conclusive.

—Powers v. Johnson, 476.

FOOD.

Our pure food statute is intended to protect the health of all of the people of the state, and the plaintiff, who bought of a retail grocer for use in preparing his food oil which defendant had sold to the grocer, is within the class for whose benefit it is intended; and this case falls within the rule that, where a statute for the benefit or protection of individuals prohibits the doing of an act or imposes a duty, any person who violates the prohibition or neglects the duty is

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FOOD—Continued.

liable to those injured thereby for damages resulting proximately from such violation or neglect.

—Meshbesher v. Channellene Oil & Manufacturing Co., 104.

The plaintiff's injuries resulted proximately from defendant's failure to comply with the statute, for it sold the oil to the grocer, knowing that it was to be sold by him to his customers for food purposes. Teal v. American Mining Co., 84 Minn. 320, 87 N. W. 837, followed.

—Meshbesher v. Channellene Oil & Manufacturing Co., 104.

The fact that the defendant did not know that the oil was impure does not affect the question of its liability, for it was bound to know whether the article which it sold for food was wholesome and complied with the statute.

—Meshbesher v. Channellene Oil & Manufacturing Co., 104.

FRAUD.

The objection that a complaint is indefinite or uncertain in its allegations of fraud cannot be raised either by demurrer or objection at the trial.

—Shaw v. Staight, 159.

The issue made by the pleadings in an action to recover damages for fraud in the exchange of land justified the court in instructing the jury that, to determine the value of what respondent parted with in the trade, they should find the difference between the value of the property and the incumbrance thereon—a building association contract.

—Hanson v. Hellie, 375.

A complaint which alleged that defendant, with intent to deceive plaintiff, represented to the latter that a third person had a curable disease and defendant could cure him, if plaintiff would pay certain moneys to defendant, and that plaintiff relied on such representations and paid the money, was *held* to state a cause of action as against a demurrer.

—Haarstad v. Gates, 565.

FRAUDS (STATUTE OF).

The written contract quoted in the opinion sufficiently expresses an agreement for the exchange of real estate and meets all the requirements of the statute of frauds.

—Stromme v. Rieck, 180.

GIFT.

Action upon a promissory note executed by the defendants to plaintiff's intestate. The defendants claimed that the deceased made a gift of the note to his daughter, one of the defendants. *Held*, (1) that the verdict for the plaintiff is sustained by the evidence; (2) that

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GIFT—Continued.

the trial court did not err in admitting evidence with reference to the contents of a will of intestate which had been lost, the evidence not being for the purpose of proving a will, but to show an act and declaration of the deceased inconsistent with the claim that he had made an absolute gift of the note.

—Peters v. Schultz, 29.

HIGHWAY.

Plaintiff, an adjoining landowner, being dependent upon a public way which had been occupied by defendant's railway tracks for access to and egress from his premises, had a special interest in the street different from the general public.

—Hruska v. Minneapolis & St. Louis Railroad Co., 98.

Respondents were the owners of certain lots in the village of White Bear, which, according to the plat, abutted on Lake avenue, which had never been improved or opened as a public street. Across the front of respondents' lots, and overlapping Lake avenue to some extent, ran a road about twenty two feet wide, which had become a public highway by user. Acting upon the belief that they possessed authority to widen the road to a distance of two rods on either side of the center line thereof, the village officers prepared to cut down the trees standing between the easterly line of the traveled road and the center of Lake avenue as platted. *Held*, the trial court was justified in finding that the destruction of the trees was not warranted, for the reason that the widening of the road at that point would meet no useful purpose, inasmuch as no authority existed for making the improvement continuous along the line of the road.

—West v. Village of White Bear, 237.

An abutting owner owns to the middle of the platted street and the soil and appurtenances within the limits of the road belong to the owner in fee, subject only to the right of the public to use or remove the same for improvement. Because trees are within a platted street it does not follow the public authorities can remove them, where not necessary for a systematic and continuous improvement of the street.

—West v. Village of White Bear, 239.

Chapter 152, p. 155, Laws 1899, providing that, when a road has been used, kept in repair, and worked for six years continuously as a public highway, the same shall be deemed to have been dedicated to the public to the width of two rods on each side of the center line of the road, has no application to roads which had become established highways by user prior to the time the act took effect.

—Gilbert v. Village of White Bear, 239.

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HIGHWAY—Continued.

Where a track travelled for many years was upon plaintiff's land and the space between the easterly line of the road and the westerly line of the platted street was twelve feet, but no part of this space had ever been used or occupied as part of the travelled road, plaintiff was entitled to an injunction restraining the village officers from cutting or removing the trees upon that space.

—Gilbert v. Village of White Bear, 239.

HOMESTEAD.

There is good authority to the effect that a sale of the homestead, inoperative because the homestead right has not been released by both husband and wife, may be rendered valid by subsequent abandonment. But estoppel of the husband would not prevent the assertion by the wife of her homestead rights.

—Lucy v. Lucy, 435.

HUSBAND AND WIFE.

Where a husband, acting as the agent of his wife, enters into an executory contract in her name for the sale of her land, and she thereafter confirms his act and offers and tenders performance, the vendee cannot refuse performance on his part on the ground that the contract is void under the statutes because made by the husband as agent. Keystone Iron Co. v. Logan, 55 Minn. 537, followed. R. L. 1905, § 3609, has no application.

—Stromme v. Rieck, 177.

INCOMPETENT.

See Insane Person.

INSANE PERSON.

In proceedings for the appointment of a guardian of a person alleged to be incompetent to manage his affairs, it is *held* that the evidence supports the conclusion of the trial court that the person was, by reason of the infirmities of old age, incompetent to have the charge and management of his property, and that his interests required the appointment of a guardian.

—Swick v. Sheridan, 130.

INSURANCE (LIFE).

Benevolent fraternal associations are not included in the class of insurance companies referred to in section 1616, R. L. 1905, which provides that neither the application nor the by-laws shall be considered as a part of the contract, unless incorporated in the policy.

—Louden v. Modern Brotherhood of America, 12.

According to the by-laws of respondent association the beneficiary fund is applicable to members only, and, to constitute membership in a

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INSURANCE (LIFE)—Continued.

prospective local lodge, the applicant must pass the physician's examination, be accepted at the head office, and be initiated and receive the obligation after the local lodge is organized. If the applicant is in good health upon the completion of these several steps, he is entitled to receive a certificate of membership.

—Louden v. Modern Brotherhood of America, 12.

Under the by-laws district and local deputies have no authority to vary the terms of the contract with applicants for membership in a local lodge, by accepting assessments or by delivering the certificate to applicants before the lodge is organized and the applicant becomes a member.

—Louden v. Modern Brotherhood of America, 12.

The application of respondent's wife was approved by the home office and returned to the local deputy, who delivered it to her with the declaration that it was in force. The lodge was organized a week later, and she was voted in as a member, but was prevented by sickness from attending, and so was not initiated and did not receive the obligation. After the lodge was organized the certificate was attested by respondent as secretary and by the president, and redelivered to her. *Held*, she did not become a member of the lodge, the contract was not completed, and the certificate was void.

—Louden v. Modern Brotherhood of America, 12.

Respondent, the beneficiary named in the certificate, reported as secretary of the local lodge to the head office that the applicant had become a member, and respondent paid several assessments, which were received and applied in payment thereof at the head office in ignorance of the facts. *Held*, acceptance of the money did not constitute a waiver by the association of the right to repudiate the transaction and the certificate upon discovery of the facts. On the undisputed evidence the defendant was entitled to judgment notwithstanding the verdict.

—Louden v. Modern Brotherhood of America, 12.

In an action to recover on a benefit certificate issued by defendant, where the insured had left home more than seven years before the action was begun, his absence was unexplained and no tidings of him had been received, there was a verdict for plaintiff. *Held:*

1. The record does not raise any question of the sufficiency of the evidence to support the verdict.
2. The trial court did not err in denying defendant's motion to postpone the trial on account of an absent witness.
3. Nor did the court err in receiving parol evidence of the contents of a published notice in reference to the disappearance of the insured.

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INSURANCE (LIFE)—Continued.

4. Nor did the court err in refusing defendant's requests for instructions to the jury, which, so far as they were correct, were covered by the general charge.

—Wehring v. Modern Woodmen of America, 25.

In an action to collect the amount of a benefit certificate issued by defendant, the court did not err in instructing the jury that if they found for the plaintiff they should allow interest from the date when the proofs of death were made and liability denied by the defendant.

—Wehring v. Modern Woodmen of America, 28.

Action to recover premiums paid upon a policy of insurance upon plaintiff's life, brought after he had reached his majority because of fraudulent misrepresentations of defendant's agents. Findings that the policy was not a necessity for the infant plaintiff, that he took it under a species of duress and that it was improvident for him to take it in view of his pecuniary situation at the time. Plaintiff was earning $600 a year and the annual premium was $39.24. The rule in Johnson v. Northwestern Mutual Life Insurance Co., 56 Minn. 365, governs, and a new trial was granted.

—Link v. New York Life Insurance Co., 33.

Under the statute as it stood before the Revision of 1905, where the constitution of a benevolent association names the persons from whom a member may select a beneficiary to receive an insurance fund, and provides that any beneficial certificate issued to any other person shall be null and void, but reserves the right to the member to change the beneficiary already named and dispose of the proceeds of the certificate by a will, a designation of any person not within any of the classes named is null and void, unless it is made by will.

—Middelstadt v. Grand Lodge of Order of Sons of Hermann, 228.

Where the member of a beneficial association disposes of the proceeds of a beneficial certificate by will, it is not necessary that the party thus receiving the fund shall have had an insurable interest in the life of the insured.

—Middelstadt v. Grand Lodge of Order of Sons of Hermann, 228.

When a member of a beneficial association, with the consent of the association, has inserted in the certificate the name of a person whom he was not authorized by the constitution to name as beneficiary, and thereafter by will bequeaths the proceeds of the certificate to the person thus illegally designated, the fact that such person was illegally named as beneficiary is of no consequence, as the fund passes by testamentary disposition, and not by virtue of the designation.

—Middelstadt v. Grand Lodge of Order of Sons of Hermann, 228.

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INTOXICATING LIQUOR.

A licensed saloon keeper cannot evade the wineroom ordinance of the city of Minneapolis by renting a part of the room covered by his license to a third party, so arranged that it may be used as a wineroom in connection with his bar.

—State v. Brown, 175.

State v. Barge, 82 Minn. 256, and State v. McGregor, 88 Minn. 74, construing the so-called wineroom ordinance of the city of Minneapolis, followed. The admitted fact that defendant maintained in the front part of the room designated in the liquor license a connecting room fitted with tables and seats for fifty eight persons, where meals and liquors were served during business hours, sustains the conviction of the defendant of a violation of the ordinance.

—State v. Klein, 184.

Public moneys for the unexpired time of liquor licenses were refunded by city officers to defendant brewing company upon surrender of such licenses before their expiration, pursuant to a city ordinance which was claimed was invalid. A subsequent curative act to validate such payments was enacted. In an action by a taxpayer to recover judgment against defendant brewing company in favor of defendant city, the findings of the trial court brought the case within the scope of the curative act.

—Calderwood v. Jos. Schlitz Brewing Co., 465.

It is unnecessary, in a criminal complaint charging a sale of intoxicating liquor on Sunday, to allege whether the person accused was or was not a licensed liquor dealer; for a sale by any person is a violation of the law.

—State v. Collins, 500.

The municipal court of the city of Minneapolis has, under the ordinances of that city regulating the sale of intoxicating liquor, authority to impose imprisonment as a punishment for an unlawful sale of such liquor, without giving defendant an option to discharge his violation of the law by the payment of a fine.

—State v. Collins, 500.

The ordinances so providing are not void as invading the constitutional rights of the accused.

—State v. Collins, 500

State v. Marciniak, 97 Minn. 355; holding that the ordinances in question are not void because in conflict with the general statutes on the same subject-matter, followed and applied.

—State v. Collins, 500.

Any variance between the allegation of the complaint that the sale was made to G. and the evidence which showed that it was made

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INTOXICATING LIQUOR—Continued.

to W., was immaterial, as the evidence showed G. and W. were engaged in a joint undertaking and were principals in the purchase.
—State v. Collins, 500.

A variance between the allegation and the proof as to the name of the waiter who made the sale will not avail the proprietor of the business in his appeal from judgment of conviction.
—State v. Collins, 502.

JUDGMENT.

To justify a judgment in any case notwithstanding the verdict, the undisputed evidence and the only inferences which can reasonably be drawn therefrom must be such as to require, as a matter of law, a directed verdict for the moving party.
—Peters v. Schultz, 30.

R. L. 1905, § 4362, providing for a motion for judgment notwithstanding the verdict has no application to a trial by the court without a jury.
—Meshbesher v. Channellene Oil & Manufacturing Co., 106.

LANDLORD AND TENANT.

The essentials of tenancies at will, at sufferance, and from month to month pointed out, and distinguished from life estates.
—Thompson v. Baxter, 122.

A lease of urban real property for as long as the tenant "shall wish to live in Albert Lea, from and after" a given date, *held* to create a life estate, terminable only at his death or removal from Albert Lea.
—Thompson v. Baxter, 122.

LIBEL AND SLANDER.

In an action for damages for slander, it is *held* that under the evidence the court was justified in instructing the jury in substance that, if the words as alleged were spoken by the defendant, the plaintiff was entitled to a verdict for some amount.
—Burch v. Bernard, 210.

Words charging an unmarried woman nurse employed in the pest house with running a bawdy house are actionable per se, and there was no evidence that the words were true, or that they were privileged, or that there was any justification for their use.
—Burch v. Bernard, 210.

To give words a privileged character, it must appear that they were spoken in the discharge of some public or private duty, legal or moral, and with that end or purpose in view, or in the conduct of some matter involving his own interests, and for the protection of such interests, that they were relevant and proper in that connec-

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LIBEL AND SLANDER—Continued.

tion, and that they were uttered in good faith and in the honest belief that they were true.

—Burch v. Bernard, 210.

A member of a city council is protected from responsibility for words used on a proper occasion which are pertinent to any proper inquiry or investigation pending before the council, but he has no privilege to wander from the subject and wantonly assail the character of an individual.

—Burch v. Bernard, 210.

In an action for damages for slander, the financial standing of the defendant may be shown for the purpose of affecting compensatory damages.

—Burch v. Bernard, 210.

LIFE ESTATE.

A lease of urban real property, conditioned respecting the term of the tenancy in the following language: "To have and to hold the above-rented premises unto the said party of the second part, his heirs, executors, administrators and assigns, for and during the full term of while he shall wish to live in Albert Lea, from and after the first day of December, 1904"—*held* to vest in the tenant a life estate, terminable only at his death or removal from Albert Lea.

—Thompson v. Baxter, 122.

LIMITATION OF ACTIONS.

The statute of limitations does not commence to run against an action to set aside a partnership accounting on the ground of fraud until discovery of the fraud.

—Johnston v. Johnston, 109.

The statute of limitations began to run against the $4,000 item involved in this case from the time respondent discovered that it had been paid to appellant's intestate.

—Johnston v. Johnston, 109.

The statute of limitations commences to run against an action for the recovery of trust funds upon the performance of the trust, or when the trustee repudiates the trust and the cestui que trust is notified thereof. The mere lapse of time, without inquiry into the trusteeship, does not of itself constitute such laches as to preclude recovery.

—Johnston v. Johnston, 118.

The rule that, whenever a person is prevented from exercising his legal remedy by some paramount authority, the time for which he is thus prevented must not be counted against him in determining whether the statute of limitations has barred his right, applies only when

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LIMITATION OF ACTIONS—Continued.

such paramount authority is invoked and the restraint induced by the debtor.

—Lagerman v. Casserly, 491.

The statutory provision suspending the running of the period of limitation during the time the beginning of an action is stayed by an injunction or other statutory prohibition applies only between parties to the suit, and not where the injunction is granted in a suit to which the debtor is not a party.

—Lagerman v. Casserly, 491.

MALICIOUS PROSECUTION.

Where the termination of a prosecution has been brought about by the procurement of the defendant, or by compromise or agreement of the parties, an action for malicious prosecution cannot be maintained.

—Wickstrom v. Swanson, 482.

The court did not err in refusing to submit the defendant's counterclaim for damages, based on his alleged malicious prosecution by the plaintiff, for the reason that the evidence did not show want of probable cause therefor.

—Wickstrom v. Swanson, 482.

MANDAMUS.

An order denying a motion to amend a proposed case, after the time limited for the service thereof, or to extend the time and permit a new case to be proposed, is not reviewable in mandamus proceedings.

—State ex rel. v. Quinn, 503.

Mandamus is the proper remedy by which to compel the performance of an act which the law enjoins as a duty resulting from an office. Rule applied in requiring a county treasurer to pay a draft properly drawn by the state auditor for taxes collected for the state.

—State ex rel. v. Holgate, 71.

It is not an objection to the issue of a mandamus against a public officer that the respondent's predecessor in office, and not the respondent, was the one who failed in the performance of the duty specified.

—State ex rel. v. Holgate, 71.

MASTER AND SERVANT.

Where it is practicable to maintain a guard over emery wheels, it is negligence per se to operate the same without a guard. They are machinery which must be guarded, as provided in R. L. 1905, § 1813.

—Davidson v. Flour City Ornamental Iron Works, 17.

The statutory duty is a continuing one, requiring the guard to be maintained while the wheel is in operation, and that duty is not discharged by merely furnishing a suitable guard and exercising reasonable care in the selection of an operator.

—Davidson v. Flour City Ornamental Iron Works, 17.

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MASTER AND SERVANT—Continued.

In this case the duties of the operator required him to change wheels from time to time to meet the exigencies of the work, and in making the change it was necessary to take off the guard. The operator removed the guard and made the change, but neglected to replace the guard, and, while revolving, the wheel burst and caused the injuries sustained by respondent. *Held*, the operator and respondent were not fellow servants. The defenses, contributory negligence and assumption of risk, have no application, and appellant was responsible for the failure to maintain the guard.

—Davidson v. Flour City Ornamental Iron Works, 17.

The rule requiring the exercise of reasonable care has no application to dangerous machinery, which it is practicable to guard. The statute requiring it to be fenced has adopted the rule of absolute duty. The master cannot delegate the performance of the act to another and thus avoid responsibility.

—Davidson v. Flour City Ornamental Iron Works, 21.

Plaintiff, directed by defendant's foreman to "put in a boom fall" on a derrick, was raised from the ground to the top of the mast by means of a block and pulley. The mast, with the rope and pulley attached to its head, had been standing in the open for two years. On the fifth trip the rope parted. Plaintiff fell and was injured. One of the wooden sides of the pulley was broken. Plaintiff contended that the rope was not kept in the groove of the wheel, but, because of the absence of a part of the side, was allowed to run on its edge, and was thereby cut or worn. It is *held* that it was for the jury to determine whether the master was guilty of negligence in failing to exercise due care in furnishing a reasonably safe instrumentality and whether plaintiff was precluded from recovering by his own conduct.

—Westin v. Anderson, 49.

In an action to recover for injuries sustained by plaintiff while at work about a log loader or jammer at one of defendant's logging camps, the complaint was good as against a general demurrer.

—Vukelis v. Virginia Lumber Co., 68.

A boy under fifteen years of age was employed in violation of R. L. 1905, § 1804, and placed at work collecting laths in bundles in a sawmill in the vicinity of dangerous machinery, which was not properly protected as required by section 1813. The boy becoming tired, sat down on a cradle of a lath machine. In rising his arm was brought in contact with a saw. *Held:*

1. That the employment of the boy and the failure properly to cover the machinery, in violation of the statute, made a prima facie case of negligence on the part of the employer.

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MASTER AND SERVANT—Continued.

2. In sitting down to rest for a short time, the boy did not depart from the scope of his employment.

3. The questions of contributory negligence and assumption of risk were for the jury to determine.

—Jacobson v. Merrill & Ring Mill Co., 74.

In an action to recover damages alleged to have been caused by the negligence of defendant's engineer in failing to inform plaintiff, one of its pitmen engaged in clearing the loading track of fallen ore, that a chunk of frozen ore was to be hoisted, it is *held* that the evidence sustains the conclusions of the jury that a vice principal directed a workman to work at a particular place, and then, without giving the usual signal, by his negligent act rendered the place dangerous, whereby the workman was injured.

—Raitila v. Consumers Ore Co., 91.

The plaintiff, an engineer, was injured by the explosion of a glass water gauge upon a steam engine about which he was working. The gauge was of standard make and of a size in common use. A number of such gauges had exploded within a short time prior to the accident, and the plaintiff informed the superintendent that he would no longer work unless a gauge of smaller diameter was installed. The superintendent conceded that the smaller gauge would be safer and agreed to make the change. In reliance upon this promise the plaintiff continued work and was injured. *Held* that, while the original installation and use of the water gauge might not have been negligent, it was for the jury to determine whether the defendant was negligent in continuing to use that size gauge after it had knowledge that it was not safe when used in that particular place.

—Nicolas v. Albert Lea Light & Power Co., 101.

The questions of contributory negligence and assumption of risk were for the jury to determine.

—Nicolas v. Albert Lea Light & Power Co., 101.

A contractor employed by the Armory Commission of Minneapolis to superintend the uncompleted work on the armory building, and at the expense of the commission employ the laborers needed, was *held* liable to a workman injured by the fall of a scaffold from which the cross braces had been removed by direction of defendant's foreman.

—Wyckoff v. Wunder, 119.

The relation of master may be assumed by one who employs another, even though he is an agent merely for the purpose of supervising the work.

—Wyckoff v. Wunder, 119.

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MASTER AND SERVANT—Continued.

One who employs another to work in proximity to a scaffold erected for the convenience of other workmen is required to exercise due care in the construction of the scaffold, and to see that it is reasonably safe for the purpose.

—Wyckoff v. Wunder, 119.

In a personal injury action, where the plaintiff knew the danger of a revolving saw, and in a dimly-lighted room attempted to oil the machinery without stopping the saw, the court rightly directed a verdict for defendant because of plaintiff's contributory negligence.

—Bean v. Keller Manufacturing Co., 162.

The plaintiff's minor son was injured by a jump saw while working in the defendant's sawmill. *Held:* The evidence did not show as a matter of law that the son was guilty of contributory negligence, or that he assumed the risks.

—Bailey v. Grand Forks Lumber Co., 192.

It was *held* that where plaintiff was seventeen years old and had worked thirty nine days in the mill, the fact that he knew of an opening in the platform above a jump saw and that, if his foot was caught therein, he would be injured, was not sufficient to support a finding that he appreciated the risk of his foot being so caught.

—Bailey v. Grand Forks Lumber Co., 192.

In an action for personal injury, the evidence was sufficient to sustain a finding by the jury that plaintiff's son was acting within the scope of his employment at the time of the injury, that defendant ought to have anticipated injury might result to its servants by reason of an unnecessarily wide opening about a jump saw, and to sustain the verdict.

—Bailey v. Grand Forks Lumber Co., 207.

A bag-turning machine, which contained a plunger under the table, the sides of which were open, is within the statute which requires dangerous machinery to be guarded.

—Abel v. Hardwood Manufacturing Co., 214.

Plaintiff was an operator on such a machine, and had been carefully instructed not to clean any part of it while in operation. While attempting to pick up a cleaning cloth from the floor for the purpose of replacing it on the frame she slipped, and was injured by her hand coming in contact with the plunger under the table. *Held*, respondent was not necessarily guilty of contributory negligence.

—Abel v. Hardwood Manufacturing Co., 214.

The plaintiff was injured while trying to stop a loaded ore car on a gravity track in the defendant's mine. The evidence was sufficient to sustain a finding that the defendant was negligent in not warning and instructing the plaintiff as to his duties and the dangers incident

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MASTER AND SERVANT—Continued.

thereto, and that he was not guilty of contributory negligence. The court did not err in its instructions to the jury.

—Arko v. Shenango Furnace Co., 220.

The proper throw necessary for a split switch, in railway construction, is an engineering proposition, to be determined by properly qualified engineers, and the verdict of a jury, or the opinion of judges, cannot be substituted therefor.

—Dolge v. Northern Pacific Railway Co., 242.

It having been shown that a throw of five inches was the standard adopted and recommended by the American Railway, Engineering, and Maintenance of Way Association, and that for all railroad purposes a throw of from four to five inches was safer than a less distance, *held*, respondent was not guilty of negligence in maintaining a split switch with a throw of four and three fourths inches, although a switchman's foot might be more readily caught therein than if the distance had been less.

—Dolge v. Northern Pacific Railway Co., 242.

Plaintiff's intestate was killed while passing between cars on defendant's repair track by a collision between a car standing on that track and another pushed down by the switching train. It was the authorized custom for repair men to pass between the cars, and for defendant, when switching, to send a servant or servants ahead on the track to warn other employees on both sides of the track of the approach of the switch train. It is *held*, in view of the presumption that deceased, when attempting to cross the rails, was in the exercise of ordinary care and was not guilty of contributory negligence, that whether defendant was negligent in failing to give the customary signals, and whether plaintiff's negligence contributed to his injury, were for the jury.

—Hawkins v. Great Northern Railway Co., 245.

The plaintiff was injured while working in the defendant's iron mine by reason of a defective fuse furnished by the defendant with which to explode dynamite. *Held*, that the evidence is sufficient to support the verdict for the plaintiff, and that the trial court committed no reversible error.

—Pintar v. Pitt Iron Mining Co., 256.

Plaintiff, a coal shoveler at an elevator, also in charge of an engine operating it, went into a small engine house to remedy something "which didn't sound right," stumbled and fell, he contended, on an unguarded belt and revolving pulley, and was hurt. In an action to recover damages it is *held:*

1. The facts brought the case within the local factory act (section 1813, R. L. 1905), "which was intended to protect from personal injury the

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workman or employee in any shop, mill, or factory by reason of dangerous machinery therein, and which must be construed to give effect to such wise and humane purposes." Christianson v. Northwestern Compo-Board Co., 83 Minn. 25, followed and applied.

2. Evidence designed to show that it was practicable and feasible to have so guarded this machinery as to have protected the servant was admissible.

3. The four walls of the engine house did not, as to plaintiff, constitute a compliance with the statute.

4. Assumption of risk and contributory negligence are separate and distinct defenses. Both are peculiar to an action on the tort and are usually implied from conduct. Assumption of risk rests upon intelligent acquiescence with knowledge of the danger and appreciation of the risks naturally incident to the employment or arising from a particular situation in which the work is done, negatives a prima facie liability of the master, and does not involve the aggravation or creation of the peril by misconduct of the servant. Contributory negligence of the servant rests on a breach of duty to take care, displaces a prima facie liability of the master, adds a new danger to the situation not necessarily incident to the work, and is imposed by law upon the servant, however unwilling or protesting he may be.

5. Assumption of risk is based, not upon the contract, but on the principle expressed by the maxim, volenti non fit injuria.

6. The test of knowledge of danger is not the exercise of ordinary care to discover danger, but whether the danger was known to or plainly observable by the employee. The test of appreciation of risk is whether the servant understood the risk, or by the exercise of ordinary observation ought to have understood it.

7. The tendency of the English authorities here reviewed, and in a less degree of the American cases, is to submit to the jury questions arising from the application of the doctrine of assumption of risk to facts which are disputed, or from which reasonable minds might draw different inferences.

8. Whether this defendant was negligent, and whether the failure to guard the pulley and belt was the proximate cause of this plaintiff's injury, were questions for the jury. So also were the questions of his assumption of the risk and his contributory negligence.

—Rase v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 260.

Plaintiff, thirty-five years of age, a foreman or straw boss of defendant, about to unload a flat car, complained to defendant's superintendent that the number of men provided him was not sufficient to do the work safely. The superintendent refused to furnish additional

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MASTER AND SERVANT—Continued.

help. Plaintiff proceeded to the work, and safely unloaded all or practically all of one of two piles of timbers on the car. In unloading the second pile, one timber in falling struck the other timbers at the top of the other tier, whereby plaintiff was thrown from the car and injured. It did not appear that, if the method used in unloading the first pile had been used in unloading the second pile, the work could have been done safely. It is *held* that plaintiff's own conduct precluded his recovery of damages.

—Manore v. Kilgore-Peteler Co., 347.

In an action to recover damages for personal injuries alleged to have been caused by the negligence of the employer in retaining in his employ a careless and incompetent fellow servant, it is *held* that in order to recover it was necessary for the plaintiff to prove that the servant was incompetent, that the defendant knew or ought to have known the fact, and yet retained him, and that the accident was caused by the particular incompetency alleged.

—Pfudl v. F. J. Romer Sons, 353.

Prior specific acts of negligence on the part of the employee, of which the employer had notice or of which by the exercise of ordinary care he would have had notice, are admissible to prove the incompetency of the employee.

—Pfudl v. F. J. Romer Sons, 353.

An objection to the question whether the employer ever had any knowledge or belief that the engineer was not competent or fit to act as engineer was properly sustained. The question was whether the master was justified in so believing.

—Pfudl v. F. J. Romer Sons, 357.

Whether specific acts of negligence of which the master had no knowledge are admissible generally to prove the incompetency of the servant.

—Pfudl v. F. J. Romer Sons, 357.

Plaintiff applied to defendant for a motor velocipede. Defendant furnished a tricycle, propelled by hand and provided with a brake. Plaintiff attached a gasolene engine, in the use and construction of which he was an expert. With defendant's consent and approval he used this motor tricycle. While plaintiff was driving it in the course of his employment, it was derailed at a frog, and plaintiff injured. The claim as to defendant's negligence was that the point of the frog was out of alignment with the rail. There was proof of some lack of alignment. The frog was of the rigid or clamp type, and in the identical condition in which it was at the time of the accident had been

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MASTER AND SERVANT—Continued.

used for two years daily by freight and passenger coaches and by locomotive engines, and at times by hand cars, without accident or trouble. The guard rail was properly placed. It is *held* that defendant's primary duty as to the frog was to furnish and maintain it so as to safely carry freight and passengers in the performance of its duty as a common carrier; that defendant's duty to plaintiff did not require it to provide a frog so mechanically perfect and in so precise alignment with its track that plaintiff could safely run his light machine, with its wheels of small diameter, thin flanges, and narrow tread, at a high rate of speed.

—Twitchell v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 383.

Plaintiff, engaged in putting dressing on a belt near the driving pulley in his employer's shop, was "squatting down" on a beam under the roof, with one leg over a rapidly revolving coupling in the main shaft. His clothing was caught in its projecting bolts. Plaintiff was badly injured. He was an experienced and educated mechanic of full age, whose duty it was to have a general supervision of the machinery of the plant. He had had abundant opportunity for observing the location and nature of the coupling. His own testimony tended to show that he had actual knowledge thereof. His attention had been directed to this particular coupling; and he had on the day of the accident, or on the previous day, repaired a companion coupling on the same shaft a few feet away. His cramped position brought the revolving coupling directly in the line of his sight. He said himself that he could have seen it, if he had looked at it. To a limited extent he admitted knowledge of the danger and appreciation of the risk. He attempted to work in a dangerous way, although other practical and safe means were at hand. It is *held* that he assumed the risk and was guilty of contributory negligence. The fact that the belt was smoking and might have burned at that place did not constitute such an emergency as to exonerate plaintiff from the consequences of his own conduct.

—Spencer v. Albert Lea Brick & Tile Co., 403.

In an action for injury received by plaintiff in falling from a swinging staging supported partly by a rope passed around an inclined iron rafter, it is *held* that the evidence was sufficient to take the case to the jury on the issues of the defendant's negligence, the contributory negligence of the plaintiff, whether a certain foreman was a vice principal, and whether the plaintiff assumed the risk, and to sustain the verdict.

—Olson v. Pike, 411.

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MASTER AND SERVANT—Continued.

Plaintiff's deceased, while working in an areaway between the defendant's concrete mixer, in course of demolition, and a new building, about completed, was killed by a board which fell from some height. It is *held* that he did not bear the burden of showing a situation in which defendant should reasonably have anticipated harm to the deceased, and should have taken precautions accordingly.

—Brennan v. Butler Brothers, 430.

The evidence was not conclusive that appellant assumed the risk or was guilty of contributory negligence in attempting to clear away the sawdust and spalts which accumulated under the saw he was operating, and it was error to order judgment for the defendant notwithstanding the verdict.

—Peek v. Ostrom, 488.

Appellant was riding on the pilot of the engine of a work train, and when the train came to a stop in the railway yards he jumped off, and was struck by an engine passing upon an adjoining track. *Held*, it conclusively appears from the evidence that he was guilty of contributory negligence.

—Martinson v. Northern Pacific Railway Co., 495.

An air hoist was peculiar in having the arms by which it was operated in reversed position from those on the other hoists in the shop, and during plaintiff's absence the hoist was moved to where he was working. In ignorance of the reversed position of the arms, when he wished to lower a heavy load he pulled the wrong arm and the load rose rapidly, was jarred loose and fell on him. It was *held:*

1. That plaintiff had borne the burden of proving the negligence of defendant by showing that the hoist was reversed, that it was of greater speed than the others, that it would not stop its motion when the appropriate chain was released but had to be controlled by using the other chain, and that it was so defectively constructed it would not hold its load.
2. That plaintiff was not guilty of contributory negligence.
3. That a verdict of $5,000 was not excessive.
4. That while the phrase: "There is a duty resting upon the employer to furnish a reasonably safe place" was inaccurate, the use of it in the charge was not reversible error, the court's attention not having been called to it until the jury had retired.

—Waligora v. St. Paul Foundry Co., 554.

Defendant was negligent in not maintaining a guard about the knives of a jointer machine.

—Bigum v. St. Paul Sash, Door & Lumber Co., 567.

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MASTER AND SERVANT—Continued.

It cannot be said as a matter of law that a cabinet maker having limited experience with a jointer machine understood the danger of passing short pieces of wood through the machine.

—Bigum v. St. Paul Sash, Door & Lumber Co., 567.

The duty of the master to furnish a reasonably safe instrumentality with which to do the work and to see that the same was kept in proper condition was a continuing duty, and was not discharged by the exercise of due care in employing a person for that purpose. The evidence sustained the allegations that the knives were not in proper order, and that defendant was responsible for this condition.

—Bigum v. St. Paul Sash, Door & Lumber Co., 567.

The evidence sustains the allegation that defendant was negligent in failing property to instruct or warn plaintiff before putting him to work on the machine.

—Bigum v. St. Paul Sash, Door & Lumber Co., 567.

Where the complaint charged that defendant was negligent in failing to maintain an automatic guard, and the evidence showed an automatic or stationary guard was feasible and the court so instructed the jury, there was no variance and defendant was not misled by the instruction.

—Bigum v. St. Paul Sash, Door & Lumber Co., 567.

MONOPOLY.

A combination, contract, or understanding, the direct and necessary effect of which is to stifle or restrict competition in trade or business, violates the anti-trust statute (chapter 359, p. 487, Laws 1899; R. L. 1905, § 5168), whatever may have been the intention of the parties.

—State v. Duluth Board of Trade, 506.

A combination, the main purposes and effects of which are to foster the trade and increase the business of those who make and operate it, and which only indirectly and remotely restricts competition in trade or business, is not a "combination and conspiracy in restraint of trade," within the meaning of the statute.

—State v. Duluth Board of Trade, 506.

An agreement or combination for the purpose of fixing and determining the value of wages or other charges for personal services is not within the prohibitions of the statute.

—State v. Duluth Board of Trade, 506.

A combination formed by dealers in articles of a similar nature in a particular locality for the purposes of fairly regulating the methods of conducting business and providing rules for fair dealing among members, but which exercises no improper control over nonmembers

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MONOPOLY—Continued.

and does not control prices or production, is not in contravention of the statute.

—State v. Duluth Board of Trade, 506.

Rule 26 of the Duluth Board of Trade, which provides that all members of the board shall charge a uniform and determined rate of commission for selling grain for nonmembers, and provides penalties for the violation of such rule, is not in violation of the Minnesota anti-trust statute.

—State v. Duluth Board of Trade, 506.

The Duluth Board of Trade, as constituted under its charter and rules, is not a conspiracy or combination in restraint of trade, or which restrains, limits, or interferes with free competition in the production of grain, or in the purchase and sale of grain at Duluth.

—State v. Duluth Board of Trade, 506.

Rule 26 of the Duluth Board of Trade does not violate the Minnesota anti-trust statute, as its direct and necessary tendency is neither to restrain trade by preventing competition in the business of buying and selling grain, nor to limit, fix, control, maintain, or regulate the price or production of any article of trade, manufacture, or use bought and sold within the state, nor to prevent or limit competition in the purchase and sale thereof.

—State v. Duluth Board of Trade, 506.

The rules of the Duluth Board of Trade do not create, or tend to create, a monopoly. Trade and commerce is monopolized when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of a commodity and to thus practically suppress competition.

—State v. Duluth Board of Trade, 506.

In a proceeding by the state against a corporation and its officers, charging them with the violation of the anti-trust statute, the state may appeal from a judgment in favor of the defendants.

—State v. Duluth Board of Trade, 506.

It is the established law of this state that a man, or any number of men, may, unless under contract obligations or engaged in an employment which charges them with a public duty, refuse to deal with any man or class of men, and that this right may be exercised singly or in combination with others.

—State v. Duluth Board of Trade, 545.

MUNICIPAL CORPORATION.

Where a police officer was suspended from actual duty on October 7, 1906, and on January 7, 1907, his name was stricken from the rolls

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MUNICIPAL CORPORATION—Continued.

by order of an incoming mayor, but his insignia of office was not requested until March 21, 1907, the evidence justified the court in finding the officer was not entitled to pay between January 7 and March 21, 1907.

—Rees v. City of Minneapolis, 23.

In an action to recover damages resulting from a change in the grade of the street fronting plaintiff's property, it is *held* that on the evidence the trial court correctly charged the jury that plaintiff was entitled to recover at least the expense necessary to adjust his property to the new street.

—Olson v. City of Albert Lea, 127.

Evidence *held* insufficient to justify the conclusion that the special benefits conferred by the change in the street grade equaled or exceeded the cost of restoring the property to its former condition.

—Olson v. City of Albert Lea, 127.

In cases of this kind the general rule of damages is the difference in the value of the property taken or damaged before and after the commission of the acts complained of, except where the cost of restoring the property to its former condition is less than the depreciated value, in which case the cost of restoration is the measure of the property owner's relief.

—Olson v. City of Albert Lea, 128.

The provisions of section 36, art. 4, of the state constitution, to the effect that no charter thereby authorized to be formed, or ordinances enacted thereunder, shall supersede any general law defining or punishing crimes or misdemeanors, apply only to cities having home rule charters.

—State v. Collins, 500.

NEGLIGENCE.

The burden of proof is on the person injured to show by a fair preponderance of evidence only that the alleged negligence was the proximate cause of the injury complained of. Where a cause is shown which might produce a given accident, and the fact appears that an accident of that particular character did occur, it may be a warrantable inference, in absence of showing of other cause, that the one known was the operative agency in bringing about such result.

—Rase v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 260.

Where the evidence of the plaintiff shows actual negligence on the part of the company, and the question of contributory negligence of plaintiff depends on a variety of circumstances, from which different minds may reasonably arrive at different conclusions as to whether con-

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NEGLIGENCE—Continued.

tributory negligence should be found or not, the question should be submitted to the jury under proper instructions, and it is error in such a case for the court to direct verdict for the defendant.

—Bremer v. St. Paul City Railway Co., 326.

The general standard of care fixed by the law is commensurate care, or due care under the circumstances.

—Campbell v. Duluth & Northeastern Railroad Co., 358.

NEW TRIAL.

The plaintiff was injured while in the employ of the defendants as a yard switchman, and recovered in this action $9,125 damages on account of his injuries. The trial court granted a new trial unless the plaintiff consented to reduce his verdict to $7,000. He did so, and defendants appealed. *Held*, where the award of damages is so excessive as to indicate that they were given under the influence of passion or prejudice, and the circumstances are such as to show a fair probability that the jury were influenced by the same passion or prejudice in determining other issues that induced them to give excessive damages, a new trial should be granted absolutely.

—Ewing v. Stickney, 217.

In view of the excessive damages and the newly discovered evidence, the trial court should have granted a new trial absolutely, instead of reducing the damages.

—Ewing v. Stickney, 217.

A new trial, as a general rule, will not be granted on the ground of newly-discovered evidence which is simply impeaching or cumulative. But there are exceptions to the rule.

—Ewing v. Stickney, 219.

In an action by a woman of thirty one years of age for personal injury by being caught in the gates upon defendant's car, where the weight of the evidence was to the effect that plaintiff was not in sound health at the time of the accident, a new trial was granted because a verdict for $4,250 was excessive.

—Webb v. Minneapolis Street Railway Co., 282.

In an action for personal injury, where the evidence showed some soreness or lameness of plaintiff's back, and conjectural nervous trouble, not reasonably shown to have been caused by the accident, a verdict of $4,060 was so excessive that a new trial was granted.

—Johnson v. Great Northern Railway Co., 285.

The evidence in this case justifies the order of the trial court granting a new trial on the ground that the damages awarded by a verdict of $3,000 for the loss of the right leg, the fracture of the kneecap of the other leg, and other serious injuries, were insufficient.

—Alton v. Chicago, Milwaukee & St. Paul Railway Co., 457.

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NEW TRIAL—Continued.

The firmly established practice in this state, requiring counsel on the trial of an action to call attention to obviously unintentional misstatements and verbal errors in the charge of the court to the jury, if deemed at all likely to be misleading, was not abrogated by the passage of Laws 1901, c. 113.

—Waligora v. St. Paul Foundry Co., 559.

In an action upon promissory notes given in part payment of the purchase price of land, where the defense was that the vendor failed to comply with the contract in furnishing an abstract of title, the trial court directed a verdict for defendant and then granted a motion for a new trial. *Held*, there was sufficient conflicting testimony to warrant granting a new trial.

—C. H. Phinney Land Co. v. Corey, 564.

In an action to have a contract and deed declared to be a mortgage, the case turned on whether the relation between defendant and plaintiff was that of attorney and client. The trial court made no express finding on the subject, although the evidence was conflicting. For this reason the judgment was reversed and a new trial ordered.

—Smith v. Funk, 571.

The trial court did not abuse its discretion in denying a new trial on the ground of newly discovered evidence.

—McAlpine v. Millen, 572.

PARTNERSHIP.

In an action by the executrix of the will of a deceased partner against the surviving partner for an accounting as to the partnership property, the findings of fact upon which the judgment is based are sustained by the evidence, and the trial court did not err in admitting parol evidence tending to show a sale of assets other than those referred to in a written agreement.

—Rines v. Ferrell, 251.

PHYSICIAN AND SURGEON.

A complaint that defendant wilfully, wrongfully and unlawfully, without having theretofore obtained from the state board of dental examiners a certificate of registration as a licensed dentist, did practice dentistry, specifying certain dental operations for one Mary Hunt, for which he received the fee stated contrary to the statute in such case made and provided, states a public offense, and the evidence is sufficient to sustain the conviction of the defendant.

—State v. Crombie, 166.

The precise character of the dental operations is not a substantive part of the offense of practicing dentistry without a certificate of registra-

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PHYSICIAN AND SURGEON—Continued.

tion as a licensed dentist, the gist of which is that the defendant practiced dentistry without a license.

—State v. Crombie, 170.

PLEADING.

A demurrer lies only on the grounds specified by the statute. Under R. L. 1905, § 4128, a demurrer to a complaint on the ground that it fails to state facts sufficient to constitute a cause of action does not reach discrepancies between the relief to which the complaint may entitle and the prayer in the summons.

—Freeman v. Paulson, 64.

As against a general demurrer to a complaint, the question is whether, assuming every fact alleged to be true, enough has been stated to constitute any cause of action whatever.

—Vukelis v. Virginia Lumber Co., 68.

A complaint will be deemed sufficient when the necessary allegations may be gathered from all the averments, although the pleading is deficient in logical order and technical language.

—Vukelis v. Virginia Lumber Co., 68.

A pleading will be held to state all facts that can be implied from the allegations by reasonable and fair intendment. Facts so implied are traversable in the same manner as though stated directly.

—Vukelis v. Virginia Lumber Co., 68.

A complaint in an action to recover damages for breach of contract to sell plaintiff's land and buy so much as was left unsold, was *held* good against a demurrer on the ground (1) the agreement to buy was without consideration, (2) the contract was void for uncertainty, and (3) an action for damages could not be maintained, because the only remedy given in case of breach by the defendant was to cancel the contract or sue for the purchase price.

—Wilcox Canadian Land Co. v. Stewart & Matthews Co., 85.

Except for our pure food laws or similar statutory provisions, the allegations of the complaint would not state a cause of action against the defendant for damages caused by the use in cooking of an impure oil manufactured by defendant; but, read in connection with the statute the court holds that they state a cause of action, for they show a neglect to discharge the duty imposed by the pure food statute and a violation of its prohibitions by defendant.

—Meshbesher v. Channellene Oil & Manufacturing Co., 107.

A complaint which states, in substance, that the defendant, a banker and man of wealth and influence in the community, maliciously established a barber shop, employed a barber to carry on the business, and used his personal influence to attract customers from the plaintiff's barber shop, not for the purpose of serving any legitimate purpose of his own, but for the sole purpose of maliciously injuring the

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PLEADING—Continued.

plaintiff, whereby the plaintiff's business was ruined, states a cause of action.

—Tuttle v. Buck, 145.

The objection that a complaint is uncertain in its allegations of fraud cannot be raised by demurrer.

—Shaw v. Staight, 159.

A complaint alleged specific acts as negligence, and contained a general allegation that the defendants otherwise negligently conducted themselves, and were guilty of such careless and negligent acts, omissions and conduct that by reason thereof, or by reason of each and all of the aforesaid negligent and careless acts, and each of them, the plaintiff was injured. No motion to make more specific was made, and at the trial evidence was received without objection tending to show a negligent act not specifically charged in the complaint, and that issue was submitted to the jury. *Held*, that the act thus proven must, after verdict, be considered as having been alleged, or at least litigated by consent.

—Christensen v. Chicago, Milwaukee & St. Paul Railway Co., 341.

In an action for wrongful death a demurrer to the complaint was properly overruled.

—Mantel v. Croxton Mining Co., 573.

After the decision on the former appeal making an injunction permanent, defendant's application to the district court for amended finding and for leave to file a supplemental complaint was denied.

—Town of Winnebago City v. Christensen, 574.

PRINCIPAL AND AGENT.

There was sufficient evidence, apart from the agent's own statement, to sustain a verdict in favor of defendants.

—Julius Kessler & Co. v. Parelius, 224.

When a principal clothes his agent with some authority, and the agent transcends that authority, or assumes other authority, and the principal does not wish to be bound by it, some positive duty then devolves on the principal, and that is to repudiate or disavow such authority to act for him.

—Lowe v. Benz, 562.

PROCESS.

In an action for divorce the return of the sheriff and an affidavit under G. S. 1894, § 4796, that the defendant could not be found within this state, although diligent effort to find him and serve upon him the summons had been made, and stating his residence in a foreign country at a designated city, were sufficient to justify the conclusion of the court that personal service could not be made and to sustain its order that service be made by publication.

—State v. Doyle, 498.

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PUBLIC LAND.

The right to indemnity land under the act of Congress of 1866 (14 Stat. 87, c. 168), granting certain lands to the state to aid in the construction of a railroad from Hastings to the western boundary of the state, conferred upon the Hastings & Dakota Railway Company by the state legislature, and the right to select the same to supply deficiencies in the place limits of the grant, became fully vested in the railway company on the completion of its road, was a substantial property right, and subject to sale and assignment by the railway company.

—Norton v. Frederick, 36.

The sale and transfer of that right by the Hastings & Dakota Railway Company to Russell Sage within three years after its dissolution was authorized by section 3431, G. S. 1894, and vested in Sage the right to make such selections as the corporation could have made, had it not been dissolved.

—Norton v. Frederick, 36.

Action to recover an alleged balance due to the state from the defendant on account of alleged sales of pine timber to the defendant pursuant to Laws 1895, p. 349, c. 163. Each of the several permits or contracts, executed by the respective parties to such sales, recited on its face facts showing a compliance with the provisions of the statute as to sales of state timber. *Held:*

1. Such permits, as against the defendant, were prima facie evidence of a valid sale of the timber described therein.

2. Unless the members of the board of timber commissioners, or a majority of them, one of whom is the Governor, officially sign a statement, indorsed upon the appraisal of timber which it is proposed to sell, to the effect that a sale thereof is necessary to protect the state from loss, any attempted sale of such timber and any permit issued for cutting it are void; but other omissions and irregularities in the sale proceedings are not jurisdictional, and do not render the sale of the permit void.

3. The finding and decision of the trial court to the effect that the timber commissioners in this case did so sign such statement, that the sales and permits are valid, and that the "jack pine" and the "dead and down timber," for which the state seeks to recover the balance of the permit price, were included in such sales and permits, are sustained by the evidence.

—State v. H. C. Akeley Lumber Co., 54.

In 1881 defendants' ancestor received certificates of sale of school lands. In 1882 he assigned the certificates, by indorsement in which the wife did not join, to persons who assigned them to plaintiff's grantor. A patent was issued to this grantor in 1890 upon payment of the balance due the state. In 1906 this grantor and her husband

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PUBLIC LAND—Continued.

conveyed to the plaintiff. The original purchaser died intestate in 1883. His wife survived until 1898. The premises at all times have been vacant and unoccupied. Timber was cut, but no permanent structure was built thereon. Taxes were paid by plaintiff, or by persons through whom plaintiff claimed. In an action to determine adverse claims it is *held* a patent regular on its face, in proper form, signed by the proper officers, with the proper seal, is conclusive evidence of regular title. Accordingly one who has a prior equitable right to receive patent superior to that of the patentee may enforce his equity by action, or, when he is defendant, by answer, in which the court may cause regular title to be vested in him and may adjudge possession to him. McKinney v. Bode, 33 Minn. 450, followed and applied.

—Holland v. Netterberg, 380.

Defendants proved no facts sufficient to entitle them to avoid the prima facie effect of the patent.

—Holland v. Netterberg, 380.

The decision in Osborn v. Froyseth, 105 Minn. 16, governs the present case.

—Osborn v. Froyseth, 568.

QUO WARRANTO.

Leave to institute and conduct proceedings in the nature of quo warranto to test the validity of proceedings had for the purpose of organizing municipal or quasi municipal corporations will not be granted at the suit of a private relator having no interest in the subject-matter distinct from that of the public. State v. Dahl, 69 Minn. 108, limited.

—State ex rel. v. Olson, 136.

A person under indictment by the grand jury of a county alleged to have been defectively organized is situated differently; but his interest in the question of the legality of the county organization differs from that of the public in degree only.

—State ex rel. v. Olson, 136.

RAILWAY.

One railway company used the tracks of another company under an agreement by which its freight train was made up by the switching crew of the latter company, while the train crew waited in the caboose. No notice of the completion of the switching was ever given to the train crew. At the time of the accident the plaintiff brakeman, thinking the switching was completed, was connecting the air coupling between the caboose and the next car, and was injured by the reckless way a cut of cars was driven against the rest of the train. *Held*, plaintiff was not necessarily guilty of contributory negligence in going between the cars to couple the air hose, and a ver-

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RAILWAY—Continued.

dict was properly directed in favor of the defendant owning the train, and a verdict against the defendant employing the switch crew was properly returned.

—Allen v. Wisconsin Central Railway Co., 5.

Where it was stipulated the schedule of a train was seven days, and there was no evidence the train ever made the schedule time, the court did not err in directing a verdict for defendant in an action for damages because certain fruit was delivered after ten days.

—Gamble-Robinson Commission Co. v. Northern Pacific Railway Co., 187.

It is a general rule that the method of constructing a railroad is an engineering question. Rule applied to the distance between the point of a split switch, when open, and the main rail. When five inches had been adopted as the standard throw of a switch, and it was shown at least three and one half inches were necessary, it was not negligence to maintain a switch at four and three fourths inches.

—Dolge v. Northern Pacific Railway Co., 242.

As there was evidence tending to show that the crew of men engaged in repairing a railroad track were being hastened in order to prepare the track for an approaching train, it was for the jury to determine whether they were being subjected to the hazards peculiar to the use and operation of a railroad.

—Christiansen v. Chicago, Milwaukee & St. Paul Railway Co., 341.

A railroad as a common carrier is required to exercise the highest degree of care, skill and foresight for the safety of passengers consistent with the practical operation of its road. But one whose primary business is to transport its logs is not held to the standard of perfection of an ideal road. Whether defendant was a general commercial railroad or a logging road was a question for the jury.

—Campbell v. Duluth & Northeastern Railroad Co., 358.

In actions brought by a husband and by his wife, respectively, but tried together, both plaintiffs were injured, as the jury found, by defendant's negligence while they were driving across its tracks. The issues of negligence and contributory negligence were submitted to the jury. The trial court charged: "The verdicts found by you will necessarily be both of them either for the plaintiff or the defendant. The evidence would not justify a verdict in one case for the plaintiff and for the defendant in the other." In so far as this instruction concerned the negligence of defendant it was correct; for the same misconduct of defendant was relied upon by both plaintiffs. In so far as this instruction concerned contributory negligence it was erroneous; for the jury might properly have returned a verdict for one plaintiff and not for the other.

—Harmon v. Chicago & Northwestern Railway Co., 479.

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REPLEVIN.

Replevin for certain cows, steers, and Angora goats. *Held*, that the findings of fact of the trial court to the effect that the plaintiff is entitled to recover the possession of the personal property are sustained by the evidence, and that there was no reversible error in the rulings of the court at the trial.

—Bernick v. McClure, 9.

In an action of replevin evidence as to the name of the record owner of land upon which the personal property claimed was kept, and in whose name it was assessed, had no direct tendency to prove title to the chattels, but it was not improper to receive the evidence upon the question of location and possession of the personal property.

—Bernick v. McClure, 11.

SALE.

The defendant sold to a retail grocer in the city of Minneapolis a quantity of oil, knowing that the same would be sold at retail to his customers for use in cooking their food. The plaintiff purchased of the grocer one quart of the oil for such purpose, which consisted of forty per cent. of mineral oil and sixty per cent. of cotton seed oil. It was injurious to health. His food, which he ate, was cooked in the oil, and he was thereby made seriously ill. Action to recover damages for the injuries so sustained. *Held:* That the findings of fact of the trial court are responsive to the issues made by the pleadings, are supported by the evidence, and sustain the conclusion of law that the defendant is liable to the plaintiff for such damages.

—Meshbesher v. Channellene Oil & Manufacturing Co., 104.

SCHOOL AND SCHOOL DISTRICT.

When a board of county commissioners creates a new school district out of territory taken from existing districts, as authorized by G. S. 1894, § 3674, it may make the division of the moneys, funds, and credits to the district affected by the change at a subsequent regular meeting of the board without a notice and hearing thereon.

—School District No. 131 of Freeborn County v. School District No. 5 of Freeborn County, 442.

SLANDER.

See Libel.

SPECIFIC PERFORMANCE.

An executory contract for the sale of the husband's real estate other than the homestead, signed by him alone, may be enforced by the vendee to the extent of the vendor's ability to perform, but not against the interest of the wife.

—Stromme v. Rieck, 177.

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STATE.

When a state institutes suit in its own behalf, it to some extent subjects itself to the same rules which apply to ordinary suitors. If it brings an equitable action, whatever may properly affect the relief demanded may be urged against it. If the action is to recover money, the defendant may plead and prove any claims which are connected with and arise out of the same transactions; but claims and demands arising out of independent transactions are in effect suits against the state, and cannot, without the consent of the state, be asserted as a set-off or counterclaim.

—State ex rel. v. Holgate, 71.

In mandamus proceedings by the state against a county treasurer to compel the payment to the state of the proceeds of taxes collected and in the possession of the county treasurer, the defendant cannot plead by way of set-off or counterclaim that other money formerly collected by the treasurer had been lost through the failure of certain banks in which the money had been deposited, and that notwithstanding such loss the amount had been paid to the state by the treasurer in the expectation that the loss would be made good by the banks and bondsmen. The matter sought to be asserted did not arise out of the same transaction and had no connection with the matter referred to in the mandamus proceedings.

—State ex rel. v. Holgate, 71.

STATUTE.

Section 4073, R. L. 1905, has always been understood as a statute of limitations, and not as one requiring a plaintiff in an action of ejectment to show actual possession in him as a condition precedent to the right to maintain the action.

—Norton v. Frederick, 42.

Where two inconsistent statutes, relating to the same subject-matter, but passed at different times, are both incorporated into a general revision, the court will, in construing them, inquire as to the date of the respective enactments, and give effect to the latest expression of the legislature.

—State ex rel. v. District Court of Hennepin County, 437.

A curative act, which provided that "in all cases where the officers of any city in this state having a population of over fifty thousand inhabitants have heretofore in good faith paid out public moneys to any person whose license to sell intoxicating liquors in such city has been revoked, or to his assigns, for the purpose of refunding to such person, or his assigns, any portion of the fee paid for such license, such payments are hereby in all respects validated and legal-

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STATUTE—Continued.

ized," was not invalid as special legislation. State v. Brown, 97 Minn. 402, followed and applied.

—Calderwood v. Jos. Schlitz Brewing Co., 465.

That curative act was valid within the rule that, unless there be a constitutional inhibition or an interference with a vested right, the legislature has power to validate invalid contracts or ratify and confirm any act it might lawfully have authorized in the first place. Here the power of the legislature to legalize was the same as its unquestionable power to have originally authorized; the city had received an exact equivalent in cash for the transaction legalized; and no vested right was impaired.

—Calderwood v. Jos. Schlitz Brewing Co., 465.

The findings of the trial court brought this case within the terms of the act, and showed good faith on the part of the city officers who had "paid out public moneys" to persons there designated in accordance with its requirements.

—Calderwood v. Jos. Schlitz Brewing Co., 465.

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STREET RAILWAY.

A street car company does not acquire by its conferred franchise a servitude or right to priority of way upon the highway, as does an ordinary freight or passenger railway company, by gift, voluntary transfer for consideration, or condemnation with compensation, as to land over which it runs its tracks. A street car and a footman or vehicle have equal rights of the same kind to the concurrent use of the city streets.

—Bremer v. St. Paul City Railway Co., 326.

The rights and duties of both are reciprocal and mutual. Each is bound to exercise commensurate care in self-protection and in avoiding harm. Such care on the part of the street car company is differentiated from that of an ordinary user of the street, because its tracks make the side movements of its cars impossible, and because it is authorized to operate heavy cars, with powerful motive force, by reason of which the momentum and inertia of its cars differ from that of ordinary vehicles.

—Bremer v. St. Paul City Railway Co., 326.

At a street crossing, or at a place used as a street crossing, the motorman in charge of a car approaching one discharging passengers is bound to keep a sharp lookout for passengers or other persons who may attempt to cross the tracks behind the other car, to have his car under such control that he can stop it upon the appearance of

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STREET RAILWAY—Continued.

danger, and to give such signals as are usually given to protect travelers who are in the exercise of ordinary prudence.

—Bremer v. St. Paul City Railway Co., 326.

The traveler on the street under such circumstances has the right to rely on the exercise of such care by the motorman, but is required to exercise due care in protecting himself and in avoiding harm. Such care does not amount to the caution required to be exercised where the highway crosses the track of an ordinary railway. The traveler is not under a hard and fast obligation to stop, or to look and listen.

—Bremer v. St. Paul City Railway Co., 326.

In this case plaintiff, a passenger on defendant street car company's west-bound car, arrived in daytime at a place not the intersection of streets, but which had been recognized and in this case was recognized by defendant as a place for discharging passengers. She followed another passenger, who had alighted before her, who crossed the track ahead of her in safety. Another car of defendant, which was loaded with crushed rock, passed the car from which plaintiff had alighted, and struck and carried her one hundred feet from the point of collision. There was contradiction in the testimony as to the speed at which it was going and as to whether it gave the usual signals. In an action to recover for consequent personal injuries it is *held* that the questions of defendant's negligence and plaintiff's contributory negligence were for the jury.

—Bremer v. St. Paul City Railway Co., 326.

TAXATION.

In the absence of statute so providing, delinquent personal property taxes do not bear interest, either from the date of delinquency or from the date of an order for judgment made in proceedings to enforce payment thereof.

—State v. New England Furniture & Carpet Co., 52.

R. L. 1905, § 4344, providing for interest in all actions for the recovery of money from the date of the verdict or order for judgment, does not apply to judgments for taxes.

—State v. New England Furniture & Carpet Co., 54.

The right to deduct debts from credits is purely a statutory one, which the legislature may grant or withhold on such conditions as it deems proper. R. L. 1905, § 836, gives such right only upon the condition that the person claiming such deduction makes affidavit as therein provided. The defendant did not comply with the condition in this case.

—State v. Nelson, 319.

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TAXATION—Continued.

Sections 794, 797, R. L. 1905, providing for the taxation of all shares of stocks in foreign corporations owned by residents of this state, are constitutional.

—State v. Nelson, 319.

The defendant was the owner of such stock, but it had never been listed or assessed in any manner for taxation. *Held*, that the trial court correctly excluded the omitted stock as a factor in determining the amount of the judgment herein for taxes on personal property.

—State v. Nelson, 319.

Lands were sold for the delinquent taxes of 1896 to 1905, inclusive, in November, 1906, at forfeited tax sale, for an amount less than was authorized by law and not authorized by the state auditor. After the right of redemption had been eliminated by notice, a Governor's deed was executed. In an action to quiet title, involving the validity of that deed, it is *held* that the sale and subsequent proceedings under it were governed by sections 936 to 940, R. L. 1905, and not by chapter 2, p. 1, Laws 1902, and the deed was valid against the objections urged against it.

—Hage v. St. Paul Land & Mortgage Co., 350.

A proportionate part of the earnings of the property of telephone companies within this state, resulting from its use in interstate commerce, constitutes a part of its gross earnings, upon which it must pay the three per cent. tax provided for by chapter 314, p. 581, Laws 1897.

—State v. Northwestern Telephone Exchange Co., 390.

The gross earnings tax provided for by the laws of this state is a tax upon the property of the corporations, and not upon the corporations, or upon the right to engage in business. Its adoption effected a change in the form, but not in the character, of the tax.

—State v. Northwestern Telephone Exchange Co., 390.

The state has a right to impose a tax upon the property within its borders, regardless of the uses to which it is devoted by its owners; and as a method of determining what is a fair and equitable property tax it may permit the tax to be computed on the basis of a fixed percentage of the earnings of the property.

—State v. Northwestern Telephone Exchange Co., 390.

Money collected by a telephone company from its patrons and subscribers for other telephone companies, with which it has traffic arrangements, is not a part of its gross earnings.

—State v. Northwestern Telephone Exchange Co., 390.

Money received from messengers not regularly in the company's service, but employed specially to call nonsubscribers to the telephone stations, and money collected from the company's patrons and subscribers as messenger charges actually paid to persons in whose

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TAXATION—Continued.

buildings the company's booths are located, and as compensation for such location, are a part of the gross earnings.

—State v. Northwestern Telephone Exchange Co., 390.

The amount which the regular rates would have produced, had the service, which was in fact rendered without charge, been charged for at the regular rates, is not a part of the gross earnings.

—State v. Northwestern Telephone Exchange Co., 390.

When it enacted c. 314, Laws 1897 (gross earnings tax on telephone companies), the legislature intended to extend to other corporations without substantial change, the system which had already been applied to railroads.

—State v. Northwestern Telephone Exchange Co., 399.

Where defendant listed its logs, lumber, lath and shingles at a value of $300,000, and it appeared the true value of the logs owned by it was $765,000, findings of the court that an arbitrary assessment of $20,500 made by direction of the city assessor did not include the property listed by defendant and there was no duplication of assessment were supported by the evidence.

—State v. C. A. Smith Timber Co., 569.

TELEPHONE.

See Taxation, 390.

TORT.

To divert to one's self the customer of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself and for the sole purpose of driving his competitor out of business, and with the intention of retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort.

—Tuttle v. Buck, 151.

TRIAL.

Where the pleadings present clearly defined issues, and other issues are not tried by consent, it is error for the court, against the objection of the defendant, to submit the case to the jury upon the evidence, instead of the pleadings.

—Bick v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 78.

The general rule is that the omission of the trial court to charge the jury upon a particular point is not error, unless the court is requested so to do. Rule applied where there was no issue made by the pleadings upon the assumption of risk, the trial court was not requested to charge on that subject, and no exception was taken.

—Bailey v. Grand Forks Lumber Co., 192.

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TRIAL—Continued.

The court did not err when giving requested instructions to the jury in stating that they were largely repetitions, with slight variations, where he did not express the opinion that the instructions asked were not the law.

—Bailey v. Grand Forks Lumber Co., 207.

The error in giving a general instruction, erroneous only because of the omission of a qualifying word, is cured by an accurate statement of the specific conditions under which the plaintiff may and may not recover.

—Christensen v. Chicago, Milwaukee & St. Paul Railway Co., 341.

Conceding that, under the pleadings and evidence in an action to recover damages for fraud in the exchange of lands, appellant was entitled to have the jury consider the peculiar character of the incumbrance—a building association contract—in determining the value of the premises, the court did not err in omitting so to instruct, in the absence of a request to that effect.

—Hanson v. Hellie, 375.

VENDOR AND PURCHASER.

A vendor of land cannot recover from his vendee by an ordinary action at law the purchase price stated in a written contract.

—Freeman v. Paulson, 64.

Where parties make a mutual executory contract for the sale of real estate, and the vendor covenants on his part to convey the land, and in consideration thereof the vendee promises to pay the purchase price, and there is nothing in the contract which makes it invalid or objectionable in its nature, nor in the circumstances connected with it, equity regards the vendee as the beneficial owner of the premises, even though he has not paid the purchase price; and the vendor has a right to enforce payment of the purchase money by a suit in equity against the vendee's equitable estate in the land, instead of by an ordinary action at law to recover the debt; and the vendor may proceed to enforce specific performance by such suit, whereby the vendee's equitable estate under the contract is sold in pursuance of a judicial decree, which will operate as an assignment of the vendee's rights under the contract, and whereby it would not operate as a cancellation of the contract itself. Abbott v. Moldestad, 74 Minn. 293, followed and applied.

—Freeman v. Paulson, 64.

A contract giving defendant the right to sell plaintiff's land upon specified terms and providing that plaintiff should have the option to cancel the contract and require defendant to buy all land unsold at the end of thirteen months, was not without consideration, did not speci-

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VENDOR AND PURCHASER—Continued.

fy the only remedy open to plaintiff, and was not so ambiguous as to render it void.

—Wilcox Canadian Land Co. v. Stewart & Matthews Co., 85.

A father, without joining his insane wife, conveyed his homestead to one son. The father abandoned the homestead, and by action secured the reformation of the deed so as to require the son to make certain payments to the father during his life, and to make other payments for the father after his death. The son made the stipulated payments. Two years later the father made a deed to another son for the consideration of love and affection and one dollar. It is *held* that the record of the deed and other proceedings, and possession of the land by plaintiff, gave notice or knowledge of the rights of the son in possession; that the father was estopped from asserting the invalidity of the first deed; and that this estoppel operated to make that deed valid as against the son, to whom the second deed had been executed.

—Lucy v. Lucy, 432.

VILLAGE.

Under the provisions of section 700 et seq., R. L. 1905, the county commissioners are not vested with discretionary power to determine whether the unplatted portion of a village, proposed for incorporation, adjoins the platted part and is so conditioned as properly to be subject to village government.

—State ex rel. v. Village of Gilbert, 364.

The unplatted territory embraced within the limits of respondent village does not adjoin the platted portion and is not so conditioned as properly to be subject to village government.

—State ex rel. v. Village of Gilbert, 364.

A "village" means an assemblage of houses, less than a town or city, but nevertheless urban or semiurban in its character. The object of the law authorizing the organization of villages was to give these aggregations of people in comparatively small space greater power of self government and of enacting police regulations than are given to rural communities under the township laws.

—State ex rel. v. Village of Gilbert, 367.

WATER AND WATERCOURSE.

An easement to overflow lands may be acquired by adverse possession by the construction and maintenance of a dam across a stream, thereby causing the lands to be continuously submerged for the statutory period.

—Simons v. Munch, 370.

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WATER AND WATERCOURSE—Continued.

Public statutes, which authorize boards of county commissioners to grant licenses for the construction of dams across streams navigable for logs and lumber, are intended for the benefit and protection of the public, and do not have the effect of limiting the easement to that purpose, as to the owners of the submerged land.

—Simons v. Munch, 370.

WITNESS.

Plaintiff does not have the strict legal right to call a defaulting defendant for cross-examination under R. L. 1905, § 4662, over the objection of an answering defendant. But the ruling of the trial court allowing the examination was not reversible error under the circumstances of the case.

—Bernick v. McClure, 10.

The object of R. L. 1905, § 4662, is to enable a party to the action to call his adversary as a witness, and obtain, if he can, from him evidence favorable to his own side of the case, without being bound by the testimony if it proves to be adverse, and in so doing to give the party so calling for such examination the advantage of a cross-examination of a witness called by himself without appealing to the discretion of the court.

—Bernick v. McClure, 11.

WORDS AND PHRASES.

"Lands adjacent thereto" in act authorizing incorporation of villages.

—State ex rel. v. Village of Gilbert, 367.

"Monopoly" conveys the idea of restraint of trade or prevention of competition because where there is monopoly there can be no competition.

—State v. Duluth Board of Trade, 523.

"Monopoly," as defined in Hawkins' Pleas of the Crown, is an allowance by the king to any person of the sole buying, selling, etc. of anything.

—State v. Duluth Board of Trade, 527.

"Tenant at will."

—Thompson v. Baxter, 124.

"There is a duty resting upon the employer to furnish a reasonably safe place in which to work" is not the best or most precise statement of the law.

—Wallgora v. St. Paul Foundry Co., 558.

A "village" as defined in R. L. 1905, § 154, relating to elections, is a municipality, and an office therein is a municipal office, within the meaning of section 336.

—State ex rel. v. District Court of Hennepin County, 438.

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WORDS AND PHRASES—Continued.

It is true that, to constitute a warranty the word "warranty" need not be used, and that a clear representation of the quality of a thing sold, made by a seller to the purchaser as a part of the contract of sale, and relied upon by him, is a warranty.

—Meshbesher v. Channellene Oil & Manufacturing Co., 107.

[End of Vol. 107.]

Ex. L. M.
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